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SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States.

OCTOBER TERM, 1948

No. 92

H. P. HOOD & SONS, INC., PETITIONER,

vs.

C. CHESTER DuMOND, COMMISSIONER OF AGRICULTURE AND MARKETS OF THE STATE OF NEW YORK,

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, ALBANY COUNTY

PETITION FOR CERTIORARI FILED JUNE 11, 1948.

CERTIORARI GRANTED OCTOBER 11, 1948.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

**IN SUPREME COURT OF NEW YORK, APPELLATE
DIVISION, THIRD DEPARTMENT**

In the Matter of the Application of H. P. HOOD & SONS, Inc.,
Petitioner, For an Order Under Article 78 of the Civil
Practice Act to Review a Determination Made by
C. CHESTER DuMOND, as Commissioner of Agriculture
and Markets of the State of New York, Respondent

STATEMENT UNDER RULE 234

This is a proceeding brought pursuant to Article 78 of
the Civil Practice Act to review a determination made on
the 30th day of April, 1946, by C. Chester DuMond, as
Commisisoner of Agriculture and Markets of the State of
New York, denying petitioner's application for an extension
of petitioner's milk dealer's license to permit petitioner to
equip and operate a milk plant at Greenwich, New York.
The order made herein by the respondent was served upon
the petitioner on May 6, 1946.

The proceeding was commenced on May 31, 1946, in the
Supreme Court, Albany County, by the service of a notice
[fol. 2] of motion and petition which was duly served upon
the respondent, returnable at a Special Term to be held in
and for the County of Albany on June 14, 1946.

Respondent, by notice of motion dated June 6, 1946, and
duly served on June 7, 1946, returnable on June 14, 1946,
moved to dismiss paragraph "15" of the petition.

By an order entered in the office of the Clerk of Albany
County on August 19, 1946, paragraph "15" of the petition
was stricken therefrom and the proceeding was transferred
to the Appellate Division, Third Department, for dis-
position.

Whalen, McNamee, Creble & Nichols (John R. Titus, Esq.,
of counsel) of Albany, New York, appear for petitioner.
Donald L. Brush, Esq., (Robert G. Blabey, Esq., of counsel)
of Albany, New York, appears for the respondent. There
has been no change of parties or attorneys herein.

[fol. 3] IN SUPREME COURT OF NEW YORK, ALBANY COUNTY
SPECIAL TERM

ORDER TRANSFERRING PROCEEDINGS TO APPELLATE DIVISION

The Petitioner herein, H. P. Hood & Sons, Inc., having moved this Court, pursuant to Article 78 of the Civil Practice Act, for an order directing a review of so much of Respondent's determination herein as denied Petitioner's application for an extension of its milk license, and transferring and referring the proceedings herein to the Appellate Division of the Supreme Court, Third Department, for determination and for such other, further and different relief as to the Court may seem just and proper; and the Respondent herein having moved this Court, pursuant to Section 1293 of the Civil Practice Act, for an order dismissing as a matter of law that part of the petition found in the paragraph thereof designated "15"; and the Court [fol. 4] having read the petition herein, dated and verified the 27th day of May, 1946, and having read the answer of the Respondent, dated and verified the 10th day of June, 1946, and his return certified on the same day, and having heard John R. Titus, Esq., of Counsel on behalf of the Petitioner and Robert G. Blabey, Esq., of Counsel on behalf of the Respondent, and upon all the proceedings and papers had and filed herein,

Now, on motion of Donald L. Brush, Esq., Attorney for Respondent, it is

Ordered, that paragraph "15" of the petition, to wit:

"Petitioner respectfully submits that the Order in question, in refusing to grant an extension of the license to which petitioner was entitled, constituted a failure on the part of the Respondent to perform a duty of the Respondent enjoined upon him by law."

be stricken from the petition.

On motion of Whalen, McNamee, Creble & Nichols, Attorneys for Petitioner, it is further

Ordered, that the proceedings herein be transferred and referred to the Appellate Division, Third Department, for determination.

Isadore Bookstein, Justice Supreme Court.

Enter.

[fol. 5] IN SUPREME COURT OF NEW YORK, ALBANY COUNTY

NOTICE OF MOTION FOR ORDER DIRECTING REVIEW

To: C. Chester DuMond, as Commissioner of Agriculture & Markets of the State of New York:

SIR:

Please take notice that upon the annexed petition of H. P. Hood & Sons, Inc., verified on the 27th day of May, 1946, and upon all the proceedings heretofore had herein, the undersigned, pursuant to Section 78 of the Civil Practice Act will move this Court at a Special Term thereof to be held in and for the County of Albany, at the County Court House, in the City of Albany, N. Y., on the 14th day of June, 1946, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an Order directing a review of so much of Respondent's determination herein as denied petitioner's application for an extension of its milk license, and upon such review, annulling Respondent's determination denying petitioner's application for extension of said milk license, and directing the issuance of the license applied for by the petitioner, and transferring and referring all the proceedings herein to the Appellate Division of the Supreme Court, Third Department, for determination and for such other, further and different relief as to the Court may seem just and proper in the premises.

[fol. 6]— Please take further notice, that pursuant to Section 1291 of the Civil Practice Act, you are required to serve at least two days prior to the return day, a verified answer, annexing thereto the certified transcript of the records of the proceedings subject to this review and any and all affidavits or other written proof to be used herein..

Yours etc., Whalen, McNamee, Creble & Nichols,
Attorneys for Petitioner, Office and Post Office
Address: 75 State Street, Albany, N. Y.

[fol. 7] IN SUPREME COURT OF NEW YORK, ALBANY COUNTY

PETITION OF H. P. HOOD & SONS, INC.

To the Supreme Court of the State of New York:

The petition of H. P. Hood & Sons, Inc., respectfully shows

1. At all times hereinafter mentioned petitioner was, and still is, a corporation organized and existing under the Laws of the Commonwealth of Massachusetts, having its principal place of business at 500 Rutherford Avenue, Boston, Massachusetts, and is authorized to do business in each of the several New England states and the State of New York.

2. On information and belief respondent herein is and at all times hereinafter mentioned was the Commissioner of Agriculture & Markets of the State of New York.

3. Petitioner, since its organization in the year 1920, has been engaged and still is engaged in business as a milk dealer, purchasing and selling milk, cream and dairy products and distributing the same to its trade in Boston, Massachusetts, and elsewhere. Petitioner's predecessor, a corporation organized under the Laws of the State of Maine, had engaged in such business since its organization in the year 1900. The predecessor of said Maine Corporation, a partnership, had been engaged in the milk business since the year 1846.

[fol. 8] 4. Petitioner has been and still is duly licensed as a milk dealer under Article 21 of the Agriculture & Markets Law of the State of New York having held license No. 51 for the license year ending March 31, 1946, and also holds such other licenses as may be required by any municipality, state, or agency of the Federal Government for the operation of petitioner's business in the various areas in which petitioner does business.

5. Prior to March 31, 1946, and on or about February 11, 1946, petitioner applied to Respondent for a milk dealer's license for the license year ending March 31, 1947, covering its existing business in the State of New York for the license year ending March 31, 1947, which application was granted by Respondent by Order dated April 30, 1946. A copy of said Order is annexed hereto as Schedule "A."

6. On or about January 30, 1946, petitioner also applied to Respondent for an extension to such license to permit petitioner to operate a milk plant at Greenwich, N. Y., which application was denied by the Respondent in the Order referred to in paragraph 5 hereof.

7. Two of the milk plants operated by petitioner and covered by the aforesaid license are situated at Eagle Bridge, N. Y., and at Salem, N. Y. During the "flush" or "peak" season approximately 2,000 40-quart cans of milk per day are handled at the Eagle Bridge plant which milk is supplied by approximately 400 producers, and from 1200 to 1300 40-quart cans of milk are handled at Salem, N. Y., [fol. 9] which is supplied by approximately 250 producers. All of this milk is sold in the Boston market area.

8. Regulations of the Boston Board of Health require that all milk must be received at milk plants and handled prior to 9 o'clock in the forenoon of each day unless such milk has been previously cooled. Due to the physical limitations of the Salem and Eagle Bridge plants operated by petitioner, considerable quantities of milk in the "flush" and "peak" seasons have been rejected due to inability of these plants to handle this volume of milk before 9 A. M. as required by the regulation of the Boston Board of Health.

9. Many producers who supply milk to the Eagle Bridge and Salem plants live nearer to Greenwich, N. Y., than to either of said present plants and if the proposed Greenwich plant were to be put in operation each producer would be allowed to deliver to the plant most convenient to him resulting in an earlier delivery at the plant and in a substantial saving to the producer through lower delivery costs, because of a shorter haul.

10. Prior to January 31, 1946, petitioner obtained an option to purchase the milk plant at Greenwich, N. Y., owned and formerly operated by Greenwich & Eastern Farm Products Co., and made extensive plans and preparations for modernization and repair of said plant.

11. Petitioner has recently modernized and enlarged its plant at Eagle Bridge, N. Y.

12. On March 13, 1946, Respondent gave notice of hearing to the petitioner and other parties interested in the [fol. 10] application of petitioner set forth in paragraphs

5 and 6 hereof, and such hearing was had before the Department of Agriculture & Markets, Division of Milk Control, on March 25, 1946. Petitioner appeared by its representatives and counsel and submitted oral and written proof to support its application for permission to open an additional plant at Greenwich, N. Y.

13. At the conclusion of said hearing, decision was reserved upon petitioner's application and subsequently on April 30, 1946, Respondent made an official order, as Commissioner of Agriculture & Markets of the State of New York, granting petitioner's application for a milk dealer's license for the license year ending March 31, 1947, insofar as existing business in New York State is concerned; and further ordered that the application for extension of such license to permit petitioner to operate a milk plant at Greenwich, N. Y., be denied, said denial to take effect immediately. Said Order and the findings of fact and conclusions accompanying same were served on petitioner on May 6, 1946. Copies of said Order, findings of fact and conclusions are annexed hereto and made a part hereof as Schedules "A," "B" and "C" respectively.

14. The conclusion made by Respondent upon which said Order was based was that the issuance of a license to petitioner which would permit petitioner to operate an additional plant, would tend to a destructive competition in a market already adequately served and would not be in the public interest.

[fol. 11] 15. Petitioner respectfully submits that the Order in question, in refusing to grant an extension of the license to which petitioner was entitled, constituted a failure on the part of the Respondent to perform a duty of the Respondent enjoined upon him by law; that such Order was made without competent proof of all the facts necessary to be proved in order to authorize the Commissioner in making the determination denying the petitioner's application.

16. Petitioner claims and alleges that it duly gave and made competent proof of all the facts necessary to be proved in order to warrant the granting of its application, and that the Respondent failed to make or offer any competent proof of all the facts necessary to be proved by the Respondent in order to authorize the making of the determination sought to be reviewed herein.

17. Petitioner further claims and alleges that upon all the evidence submitted there was such a preponderance of proof against the existence of any of those facts upon which the conclusions of the Respondent were based, as would cause a Justice of the Supreme Court, in an action triable by a jury, to set aside any verdict of a jury based upon the existence of such facts as against the weight of the evidence.

18. Petitioner claims and alleges that the action of the Respondent in denying its application for the extension of its license to permit the operation of a milk plant in Greenwich, N. Y., is illegal, improper, arbitrary and capricious.

[fol. 12] 19. None of the reasons set forth in Section 258-c of Article 21 of the Agriculture & Markets Law exists as would warrant or justify the making of the Order sought to be reviewed and petitioner alleges that it has not committed any of the acts set forth in subdivisions (a) to (m) of said Section 258-c.

20. This is an application for an Order pursuant to Article 78 of the Civil Practice Act and the purpose of this proceeding is to review so much of the Order made by the Respondent on April 30, 1946, as denied the application of the petitioner for an extension of its license to permit it to operate a milk plant in Greenwich, N. Y. Section 258-d of the Agriculture & Markets Law expressly authorizes the review of such an Order.

21. Thirty days have not elapsed since the service upon the petitioner of a copy of such Order, and no previous application for an Order to review the determination of the Commissioner has been made.

Wherefore, petitioner prays that an Order be made directing a review of the determination of the Respondent and, upon such review, that a final Order be made annulling the Respondent's determination and directing the Respondent to grant petitioner's application for an extension of its license as prayed for, and for such other, further and different relief as the Court may deem just and proper in the premises.

[fol. 13] In accordance with the Statutory Provisions upon the filing of the Respondent's answer and return herein, all

the proceedings herein should be transferred and referred to the Appellate Division, Third Department, for determination.

Dated: May 27, 1946.

H. P. Hood & Sons, Inc., by G. H. Hood, Jr., Treasurer. (Seal.)

Verified May 27, 1946.

[fol. 14] SCHEDULE "A" ATTACHED TO PETITION

STATE OF NEW YORK, DEPARTMENT OF AGRICULTURE & MARKETS, DIVISION OF MILK CONTROL

In the Matter of the Question as to whether or not application for a Milk Dealer's License for the license period ending March 31, 1947, shall be issued to H. P. Hood & Sons, Inc., 500 Rutherford Ave., Boston, Mass., pursuant to the provisions of Article 21 of the Agriculture and Markets Law.

OFFICIAL ORDER

The above entitled proceeding having regularly come on to be heard before Laurance L. Clough, Assistant Director of the Division of Milk Control, Department of Agriculture and Markets, duly designated for that purpose by the undersigned Commissioner, and said hearing having been had for the purpose of determining whether or not application for a Milk Dealer's License made by H. P. Hood & Sons, Inc., 500 Rutherford Ave., Boston, Mass., for the license period ending March 31, 1947, shall be granted, and the issues in this proceeding having regularly come on to be heard before the aforesaid Laurance L. Clough on the 25th [fol. 15] day of March 1946 at the Office of the Department of Agriculture and Markets, 20th Floor, State Office Building, Albany, N. Y., and the said Laurance L. Clough having heard the allegations and proofs of the respective parties, and due deliberation having been had, and it appearing that issuance of the license with the extension requested would tend to a destructive competition in a market already adequately served and that the issuance of such extension is not in the public interest;

Now, therefore, I, the undersigned Commissioner of the Department of Agriculture and Markets of the State of

New York, by virtue of the power and authority in me vested, do hereby

Order that the application of H. P. Hood & Sons, Inc., for a Milk Dealer's License for the license year ending March 31, 1947 be granted in so far as their existing business in New York State is concerned; and it — further ordered that the application for extension of such license to permit them to operate a milk plant at Greenwich, New York be, and the same hereby is denied, said denial to take effect immediately.

(S.) C. Chester Du Mond, Commissioner of the Department of Agriculture and Markets of the State of New York.

Dated and sealed at the City of Albany, New York, this 30th day of April, 1946.

[fol. 16] SCHEDULE "B" ATTACHED TO PETITION

STATE OF NEW YORK, DEPARTMENT OF AGRICULTURE AND MARKETS, DIVISION OF MILK CONTROL

In the Matter of the Question as to whether or not application for a Milk Dealer's License for the license period ending March 31, 1947, shall be issued to H. P. Hood & Sons, Inc., 500 Rutherford Ave., Boston, Mass., pursuant to the provisions of Article 21 of the Agriculture and Markets Law.

FINDINGS OF FACT

H. P. Hood & Sons, Inc., 500 Rutherford Ave., Boston, Mass., applied to the Commissioner of Agriculture and Markets for a Milk Dealer's license for the license year ending March 31, 1947. Applicant was duly notified of the time and place of a hearing to consider such application. Such hearing was held March 25, 1946 and applicant appeared by Counsel, John R. Titus, Esq., of Whalen, McNamee, Creble & Nichols.

Upon the basis of the evidence then received, I do hereby find as follows:

[fol. 17] 1—H. P. Hood & Sons, Inc., hereinafter referred to as applicant, made application for a Milk Dealer's License for the license year ending March 31, 1946, pursuant

to the provisions of Article 21 of the Agriculture and Markets Law. (Ex. 2)

2—Applicant then operated milk plants at Eagle Bridge, Salem and Norfolk, N. Y. (Ex. 2)

3—Milk Dealer's License No. 51 was issued to applicant on or about April 1, 1945 for the license year ending March 31, 1946. (Ex. 3)

4—Applicant has made application for a license for the license year ending March 31, 1947. (Ex. 5)

5—Applicant wishes to equip and operate an additional milk plant to be located at Greenwich, N. Y. (Ex. 4)

6—The milk now received by applicant at Eagle Bridge and Salem is shipped to Boston for fluid consumption. (H. R.; p. 6)

7—The Boston Board of Health requires that all milk be received at the country plant before 9:00 A.M. unless it is cooled before delivery. (H. R. p. 6)

8—Applicant has experienced some difficulty during the flush season because of the inability of the plant facilities to handle the milk by 9:00 A.M. (H. R. p. 6)

9—Some milk now received at Eagle Bridge is cooled before being delivered to the plant but a substantial portion of it is not. (H. R. p. 15)

[fol. 18] 10—Applicant's plant at Eagle Bridge has recently been modernized and to some extent the capacity has been enlarged. (H. R. p. 7)

11—Applicant proposes, if permitted to do so, to receive milk from producers at Greenwich, weigh, sample, test and cool the milk and ship it as fluid milk. (H. R. p. 7)

12—There will be no manufacturing done at Greenwich. (H. R. p. 7)

13—Applicant proposes, if permitted to operate such a plant, to divert about 200 cans of milk daily from Eagle Bridge and about 100 cans daily from Salem. (H. R. p. 6) (These are the quantities to be diverted in the flush period)

14—If applicant is permitted to operate the proposed plant, producers will be permitted to deliver to the plant

which is most convenient. No producer will be directed to deliver his milk to the new plant if he does not wish to do so. (H. R. p. 21)

15—Any producer who commences delivery to the Greenwich plant will continue to deliver there during the entire year if he wishes to. (H. R. p. 7)

16—If permission is granted to operate the new plant, applicant intends to take on 20 or 30 new producers at the Greenwich plant in addition to those who might change to that plant from Eagle Bridge and Salem. (H. R. p. 22)

17—A number of the present producers will save some hauling expenses by delivering their milk to Greenwich instead of Eagle Bridge and Salem. (H. R. p. 23)

[fol. 19] 18—There are several plants in the vicinity of Greenwich. Applicant operates the plant at Salem which is about 10 miles away and another one at Eagle Bridge about 12 miles away. (H. R. pp. 25, 26) Middletown Milk and Cream Company operates a plant at Fort Edward, also about 12 miles away. (H. R. p. 47)

Sheffield Farms operates a plant at Cambridge about 10 or 12 miles away. (H. R. p. 45)

Gold Medal Farms, Inc. operates a plant at Buskirk, a short distance from Eagle Bridge. (H. R. p. 55)

19—The plants at Ft. Edward, Cambridge and Buskirk can handle more milk. (H. R. pp. 45, 49, 56)

20—Some Troy dealers now obtain milk in the area where applicant purchases. (H. R. 35, 67)

21—The supply of milk for the Troy market during the last short season of October through January was inadequate. (H. R. p. 39)

22—There are producers who live within 10 miles of Greenwich who now deliver their milk to Glens Falls. (H. R. p. 41)

23—There was once a milk plant at Greenwich operated by the Dairymen's League. The plant has been closed. (H. R. p. 36)

24—The Dairymen's League also once operated a plant at Cambridge. That plant has also been closed. (H. R. p. 37)

CONCLUSION

Applicant already has two milk plants, one at Eagle Bridge and one at Salem, New York. Applicant desires to operate a third plant in the vicinity to which some of the milk now being delivered to the existing plants would be deferred. In addition, applicant hopes to secure milk from 20 to 30 additional producers who are not now delivering to any of their plants.

There are three milk plants quite near Greenwich, aside from the two operated by applicant. These plants have the capacity to handle more milk than they are now handling. In addition, some Troy dealers and some Glens Falls dealers now obtain milk in the area where applicant is purchasing milk. At one time there were milk plants at Cambridge and Greenwich, which have since been closed.

The Commissioner takes judicial notice of that portion of the report of the New York State Temporary Commission on Agriculture in which it is shown that one of the factors affecting the economy of operating country milk plants, is the volume of milk handled. In 1944 there were more than 100 plants in New York State with a volume lower than 300 cans per day which is considered necessary for efficient operation. (See Report of the New York State Temporary Commission on Agriculture—Feb. 1946)

The Commissioner also takes judicial notice of that part of Bulletin 473 of the Cornell University Agricultural Experiment Station, entitled "The Cost of Handling Fluid Milk and Cream in Country Milk plants"; which appears on Page 118 and which reads as follows: "in each case the volume of milk received at the individual plants was by [fol. 21] far the most important factor affecting the cost per 100 pounds."

If applicant is permitted to equip and operate another milk plant in this territory, and to take on producers now delivering to plants other than those which it operates, it will tend to reduce the volume of milk received at the plants which lose those producers, and will tend to increase the cost of handling milk in those plants.

If applicant takes producers now delivering milk to local markets such as Troy, it will have a tendency to deprive such markets of a supply needed during the short season.

There is no evidence that any producer is without a market for his milk. There is no evidence that any producers not now delivering milk to applicant would receive any higher price, were they to deliver their milk to applicant's proposed plant.

The issuance of a license to applicant which would permit it to operate an additional plant, would tend to a destructive competition in a market already adequately served, and would not be in the public interest.

The application of H. P. Hood & Sons, Inc. for a Milk Dealer's License for the license year ending March 31, 1947 should be granted in so far as their existing business in New York State is concerned. Their application for extension of such license to permit them to operate a plant at Greenwich should be denied.

C. Chester Du Mond (S.), Commissioner of the Department of Agriculture and Markets of the State of New York.

Dated at Albany, New York this 30th day of April, 1946.

[fol. 22] IN SUPREME COURT OF NEW YORK

ALBANY COUNTY

RESPONDENT'S NOTICE OF MOTION

SIRS:

Please take notice that on the petition verified the 27th day of May, 1946, in the above entitled proceeding, and pursuant to section 1293 of the Civil Practice Act, the respondent Commissioner of Agriculture and Markets of the State of New York will make application to a Special Term of Supreme Court appointed to be held in and for the County of Albany, at the Court House in the City of Albany, New York, on the 14th day of June, 1946 (the day on which the petition herein is returnable), at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel may be heard, for an Order dismissing, as a matter of law, that part of the petition found in the paragraph thereof designated "15" which alleges that the order, which is the subject of review in this proceeding, denied an extension of license to which petitioner was entitled and that

such denial "constituted a failure on the part of the Respondent to perform a duty of the Respondent enjoined upon him by law" on the ground:

- (1) That such an application is in the nature of mandamus and the petition does not disclose that the petitioner has a clear, legal right to such relief; and
- (2) That even if the commissioner had acted contrary to any alleged right of the petitioner when he denied [fol. 23] its application for license extension (and such is in no way conceded) mandamus will not lie to correct an administrative abuse.

Dated: Albany, New York, June 6th, 1946.

Yours, etc., Donald E. Brush, Counsel to the Department of Agriculture and Markets of the State of New York. Robert G. Blabey, of Counsel. Attorneys for Respondent Commissioner C. Chester Du Mond. Office and Post Office Address: Alfred E. Smith State Office Building, Albany, New York.

To: Whalen, McNamee, Creble & Nichols, Esqs., Attorneys for Petitioner. Office and Post Office Address: 75 State Street, Albany, New York.

[fol. 24]

IN SUPREME COURT OF NEW YORK

ALBANY COUNTY

ANSWER

The respondent Commissioner of Agriculture and Markets of the State of New York for his answer to the petition in this proceeding alleges as follows:

I.

Admits the allegations of the paragraphs of the petition designated: "1," "2," "5," "6," "7," "8," "9," "10," "11," "13," and "21."

II

Admits the allegation of the paragraph of the petition designated "4" except that as to said paragraph the commissioner denies any knowledge or information sufficient

to form a belief as to whether petitioner holds "such other licenses as may be required by any municipality, state, or agency of the Federal Government for the operation of petitioner's business in the various areas in which petitioner does business."

III

Admits the allegations of the paragraph of the petition designated "14" in so far as therein alleged but submits that the commissioner's findings and order are the best [fol. 25] evidence of his action respecting petitioner's application for license and license extension.

IV

Denies the allegations of the paragraphs of the petition designated "12," except as to said paragraph "12" it is admitted that notice of hearing was given to petitioner and that hearing was had before the department on March 25, 1946; "15"; "16"; "17"; "18," and "19."

V

Denies the allegations of the paragraph of the petition designated "20" for the purpose of raising the legal issue therein framed, viz: "whether petitioner by its acceptance of the license issued has waived the right to contest the denial of its extension."

VI

Denies any knowledge or information sufficient to form a belief as to the allegations of the paragraph of the petition designated "3" and therefore denies the same except that it is admitted the petitioner "has been engaged and still is engaged in business as a milk dealer."

VII

In accordance with the right granted by section 1293 of the Civil Practice Act, the respondent Commissioner of Agriculture and Markets of the State of New York raises by [fol. 26] separate motion returnable on the return day of this proceeding an objection in point of law which, in his opinion, warrants the dismissal of that part of the petition which alleges in the paragraph thereof designated "15" that the respondent failed to perform a duty enjoined upon him by law and such objection as set forth in said motion

is made a part of this answer as though fully incorporated herein.

FOR A COMPLETE, SEPARATE AND AFFIRMATIVE DEFENSE TO THE PETITION HEREIN, THE RESPONDENT COMMISSONER ALLEGES:

VIII

The petitioner H. P. Hood & Sons, Inc., without protest accepted and retained Milk Dealer's License No. 2996 for the statutory license period ending March 31, 1947, upon the terms and in accordance with the understanding expressed to it in a letter from the respondent commissioner (Division of Milk Control) dated May 4, 1946.

IX

By its acceptance and retention of the license issued as aforesaid, petitioner H. P. Hood & Sons, Inc., is estopped to question the legality of the order limiting the scope of the license while at the same time retaining the benefits thereunder.

Wherefore, in conclusion the respondent commissioner respectfully submits that the petition should be forthwith [fol. 27] dismissed and his determination confirmed with costs.

In accordance with the requirements of Civil Practice Act section 1291, there is annexed to this answer a copy of the commissioner's Findings of Fact and Conclusion dated April 30, 1946 (attached thereto as Respondent's Exhibit A); the commissioner's Official Order dated April 30, 1946 (attached hereto as Respondent's Exhibit B), both of which exhibits are made a part hereof as though fully recited herein, and this answer is filed in accordance with law together with a certified transcript of the record of proceedings subject to review or consideration, and the Memorandum of Kenneth F. Fee dated May 3, 1946 (attached hereto as Respondent's Exhibit C).

Donald L. Brush, Counsel to the Department of Agriculture and Markets of the State of New York.
Robert G. Blabey, Of Counsel, Attorneys for Respondent Commissioner C. Chester Du Mond, Office and Post Office Address: Alfred E. Smith State Office Building, Albany, New York.

(Verified June 10, 1946.)

[fol. 28] EXHIBIT "C" ATTACHED TO ANSWER

State of New York

Department of Agriculture and Markets

Division of Milk Control

In the Matter of The Question as to whether or not application for a Milk Dealer's License for the license period ending March 31, 1947, shall be issued to H. P. HOOD & SONS, INC., 500 Rutherford Ave., Boston, Mass., pursuant to the provisions of Article 21 of the Agriculture and Markets Law

Memorandum

The application of H. P. Hood & Sons, Inc., 500 Rutherford Ave. Boston, N. Y. for permission to equip and operate a milk plant at Greenwich, N. Y., pursuant to the provisions of Article 21 of the Agriculture and Markets Law, has been denied by the Commissioner for the reasons set forth in his Findings of Fact and Official Order dated April 30, 1946, which are attached hereto and hereby made a part hereof.

This memorandum is to be filed in the office of the Division of Milk Control pursuant to the provisions of the last paragraph of Section 258-c of the Agriculture and Markets Law.

(S.) Kenneth F. Fee, Director, Division of Milk Control.

Dated at Albany, N. Y. May 3, 1946.

[fol. 29] IN SUPREME COURT OF NEW YORK, ALBANY COUNTY

RETURN

Respondent Commissioner of Agriculture and Markets of the State of New York in accordance with the requirement of Civil Practice Act section 1291 hereby returns with his Answer the transcript of the record of proceedings subject to review or consideration herein and by his signature and the seal of the Department of Agriculture and Markets of the State of New York certifies the following:

(a) Copy of minutes of hearing held March 25, 1946.

(b) Copy of Notice of Hearing dated March 13, 1946, and two attached United States Post Office Return Receipts. (Exhibit No. 1 on Hearing of March 25, 1946.)

(c) Copy of petitioner's application for a milk dealer's license dated February 19, 1945, for the license period ending March 31, 1946. (Exhibit No. 2 on Hearing of March 25, 1946.)

(d) Copy of Milk Dealer's License No. 51 issued by respondent to petitioner for the license period ending March 31, 1946. (Exhibit No. 3 on Hearing of March 25, 1946.)

(e) Copy of petitioner's letter dated January 30, 1945, addressed to Mr. J. A. Conboy, Supervisor of Licensing of [fol. 30] the Division of Milk Control. (Exhibit No. 4 on Hearing of March 25, 1946.)

(f) Copy of petitioner's application for a milk dealer's license dated February 11, 1946, for the license period Ending March 31, 1947. (Exhibit No. 5 on Hearing of March 25, 1946.)

(g) Copy of letter dated May 4, 1946, written by Mr. J. A. Conboy, Supervisor of Licensing of the Division of Milk Control, enclosed with petitioner's Milk Dealer's License as issued for the license period ending March 31, 1947. (The license is in possession of petitioner and therefore is not returned herewith.)

(h) Copy of tabulation entitled: "Middletown Milk & Cream Co., Inc.—Number of Producers Delivering Milk to Fort Edward N. Y. Plant—January, 1941 to March, 1946." (Exhibit No. 6-A on Hearing of March 25, 1946.)

(i) Copy of chart. (Exhibit No. 6-B on Hearing of March 25, 1946.)

(j) Copy of respondent's Findings of Fact and Conclusion dated April 30, 1946. (These Findings and Conclusion are made Exhibit A on respondent's Answer and are therefore not returned herewith.)

(k) Copy of respondent's Official Order dated April 30, 1946. (This Order is made Exhibit B of respondent's Answer and is therefore not returned herewith.)

[fol. 31] (l) Copy of Memorandum of Director Kenneth F. Fee dated May 3, 1946. (This Memorandum is made

Exhibit C of Respondent's Answer and is therefore not returned herewith.)

C. Chester DuMond, Commissioner of Agriculture
and Markets of the State of New York.

Dated and Sealed at the City of Albany, New York, this
10th day of June, 1936. (Seal.)

[fol. 32] DOCUMENT "G" OF RETURN

Copy

May 4, 1946.

H. P. Hood & Sons, Inc., 500 Rutherford Avenue, Boston
29, Massachusetts.

DEAR SIRs:

Inclosed find milk dealers license No. 2996 issued to you pursuant to the provisions of Article 21 of the Agriculture and Markets Law for the license year ending March 31, 1947. This license permits you to operate milk plants within the State of New York at Eagle Bridge, Norfolk, and Salem. Card certificates to be posted in said plants are inclosed herewith.

Department records show that your application for permission to operate a milk plant at Greenwich was denied by the Commissioner under date of April 30, 1946, and that an official order was mailed to you to that effect. Your license inclosed, therefore, does not permit you to operate a milk plant at Greenwich, New York.

Very truly yours, Division of Milk Control, (S.) J. A.
Convoy, Supervisor of Licensing.

JAC:EGS.
Enclosure.

1946-1947

Milk Dealer's License, State of New York, 1946, 1947

Department of Agriculture and Markets

Division of Milk Control

Pursuant to the provisions of Article 21 of the Agriculture and Markets Law (Chapter 126 of the Laws of 1934 as amended), (Name of Licensee) H. P. Hood & Sons, Inc. of (Address) 500 Rutherford Avenue, Boston 9, Massachusetts hereinafter referred to as the licensee is, unless otherwise restricted, conditioned, or limited below, hereby licensed to purchase milk or cream from other licensed milk dealers, exclusive of cooperative associations. In case the licensee has filed a surety bond or has been relieved from so doing by the undersigned Commissioner, the licensee is, unless otherwise restricted, conditioned, or limited below, hereby licensed to purchase milk or cream from producers at the plant or plants named in the licensee's application only, and from cooperative associations licensed pursuant to Article 21 of the Agriculture and Markets Law. The licensee is, unless otherwise restricted, conditioned, or limited below, licensed to deal in, handle, distribute, or sell, in accordance with the intent indicated in the licensee's application, milk or cream; or both, in the place or places specifically named therein, and in no other place or places, [fol. 34] and then only on the route or number of routes of the character (wholesale or retail) indicated therein. No milk or cream shall be purchased from or sold to a dealer required to be licensed unless such dealer be duly licensed.

This license is valid until March 31, 1947, unless sooner revoked.

Dated at Albany, N. Y., May 4, 1946.

\$1,645 fee paid for license.

C. Chester Dumond, Commissioner of Agriculture and Markets, by Kenneth F. Fee, C, Director, Division of Milk Control.

This License cannot be sold or transferred.
Referred to in Paragraph "G" of Return.

[fol. 35] State of New York, Department of Agriculture and Markets, Division of Milk Control

Hearing Held in the Office of the Department of Agriculture and Markets, 20th Floor, State Office Building, Albany, N. Y., on the 25th day of March, 1946, at 2 P. M.

In the Matter of The Question as to Whether or Not an Extension of MILK DEALER'S LICENSE No. 51, Heretofore Issued to H. P. Hood & Sons, Inc., 500 Rutherford Ave., Boston, Mass., for the License Period Ending March 31, 1946, Shall be Granted Pursuant to the Provisions of Article 21 of the Agriculture and Markets Law

Transcript of Hearing

Hearing held before Mr. Laurance L. Clough, Assistant Director.

Appearances:

For the Department: Donald L. French, Hearing Deputy.

For the Applicant: Whalen, McNamee, Creble & Nichols, Counselors at Law, 75 State St., Albany, N. Y., by John R. Titus, Esq., of Counsel.

[fol. 36] For the Opposition:

Frederick Rohlf, Esq., representing Sheffield Farms Company.

Edward O. Mather, Esq., Executive Director, Milk Dealers Association of Metropolitan New York, Inc., New York; also Borden Farm Products Division of Borden Company, and The Middletown Milk & Cream Company, Yonkers, N. Y.

William Green, Jr., representing Green's Ice Cream Company, Schenectady, N. Y.

John P. Weatherwax, Esq., by James M. Strang, Esq., representing The Washington and Rensselaer Counties Cooperative Association, Inc., Cambridge, N. Y., and also for Gold Medal Farms, Inc., Bronx, N. Y. with a plant at Buskirk, N. Y.

Edward McClellan, representing the Washington and Rensselaer Counties Cooperative Association, Inc., Cambridge, N. Y.

Paul Steffen, Jr., representing Gold Medal Farms, Inc., 1157 E. 156th St., New York City.

Robert Lamont, Esq., representing the Dairymen's League Cooperative Association, Inc., Cobleskill, N. Y.

David R. Lalor, Esq., General Ice Cream Company, Schenectady, N. Y.

Thomas P. Waterhouse, representing Bellview Dairy, Schenectady.

John W. Burke, representing Vermont Milk & Cream Company, Middlebury, Vt.

Arthur J. Sliter, representing Sliter's Dairy, Troy, N. Y.

John W. Claydon, Executive Secretary, Troy Area Dairy Council, Inc., 1531 Sixth Ave., Troy, N. Y.

[fol. 37] Joseph F. Connolly, representing the Schenectady Dairy Council, Schenectady, N. Y.

OFFERS IN EVIDENCE

Mr. French: I produce from the records of the Division of Milk Control and offer in evidence copy of Notice of Hearing sent to H. P. Hood & Sons, Inc., and signed for the Commissioner by Kenneth F. Fee, Director, on the 13th day of March, 1946. Attached are United States Post Office return receipts.

You admit receipt of the notice, Counsel?

Mr. Titus: We do.

The Chair: The copy of the notice will be received and marked Exhibit No. 1.

Mr. French: I offer application for a renewal of Milk Dealer's License filed by H. P. Hood & Sons, Inc., appearing to have been signed on behalf of the corporation by G. H. Hood, Jr., Vice President and Treasurer, at Boston, Mass. on the 19th day of February, 1945.

Will you identify it, Counsel?

Mr. Titus: I have never seen it. I have no objection to it.

The Chair: It will be received and marked Exhibit No. 2.

Mr. French: I offer copy of Milk Dealer's License No. 51, heretofore issued to H. P. Hood & Sons, Inc. on April 1, 1945.

Mr. Titus: No objection.

The Chair: The copy of the license will be received and marked Exhibit No. 3.

Mr. French: I offer a letter on the stationery of H. P. Hood & Sons, Inc. dated January 30, 1946, addressed to Mr. J. A. Conboy, Supervisor of Licensing, and appearing to have been signed by Don N. Geyer.

Will you identify it, Counsel?

[fol. 38] Mr. Titus: No objection.

The Chair: The letter will be received and marked Exhibit No. 4.

Mr. French: I assume, Counsel, that you are now prepared to show cause to the Commissioner why the extension applied for should be granted to your corporation?

Mr. Titus: Yes.

Mr. French: Mr. Titus, are you willing to stipulate that any and all facts or evidence produced here today be considered in connection with a new application for a license filed by H. P. Hood & Sons, Inc. for the license period beginning April 1, 1946 and expiring March 31, 1947, in view of the fact that there are only a few days remaining of the current license year?

Mr. Titus: We so stipulate.

Mr. French: Then I will offer at this time the application for the license period ending March 31, 1947, which appears to have been signed on behalf of the corporation by G. H. Hood, Jr., at Boston, Mass., on the 11th day of February, 1946.

Mr. Titus: No objection.

The Chair: I assume you will have no objection to the notice being amended to include consideration of this new application.

Mr. Titus: No objection.

The Chair: The application will be received in evidence and marked Exhibit No. 5.

Mr. French: Now, before we proceed, is there anyone in the room whose appearance has not been noted on the record and who wishes to be noted on the record?

(No response.)

Mr. French: It is all yours, Mr. Titus.

Mr. Titus: I will call Mr. W. O. Whiting.

[fol. 39] W. O. WHITING, being duly sworn, testified as follows:

By Mr. Titus:

Q. Mr. Whiting, you are employed by whom?

A. H. P. Hood & Sons, Inc.

Q. And in what capacity?

A. Assistant Country Production Manager.

Q. Where is your office?

A. 500 Rutherford Avenue, Boston, Mass.

Q. Will you explain for the record and for the Commissioner your duties, particularly as relating to the application before the Commissioner at the present time?

A. Assisting the Production Manager of Hood & Sons in securing adequate supplies of milk and maintenance of the quality of that milk for H. P. Hood & Sons, Inc.

Q. Does Hood operate plants at the present time in Eagle Bridge and Salem, N. Y.?

A. They do.

Q. In your capacity, are you familiar with the operations of these plants?

A. Yes.

Q. Are you familiar with the application of Hood and plans if the application is granted with relation to the purchase and re-opening of the Greenwich and Easton Farm Products Company at Greenwich, N. Y.?

A. Yes, I am.

Q. Will you, for the record, explain to the Commissioner somewhat in detail your present operations at Eagle Bridge and Salem?

A. We have two plants as indicated at Eagle Bridge and Salem, N. Y. The flush season peak in Eagle Bridge is about 2,000 jugs of milk a day.

Q. Possibly it will be well to indicate in the record that a jug is a 40-quart can.

[fol. 40] A. Salem, N. Y.—the other plant which we operate—has a peak production of 1200 to 1500 jugs of milk per day. The primary reason for our applying—

Q. Before we come to that, what do you do with this milk?

A. This milk is received, weighed, sampled, cooled and placed in tank cars or tank trucks for shipment, and shipped to the City of Boston for fluid milk consumption.

Q. Is any manufacturing done at any of these plants?

A. Not at the present time.

Q. Go ahead.

A. The primary objective for our requesting an extension of the license to include the Greenwich, N. Y. location is occasioned by the volume of milk handled in the peak at the two locations—Salem and Eagle Bridge. The Boston Board of Health regulations call for the receiving of all milk and handling of the same prior to 9 A. M. unless the morning's

milk is cooled. If the morning's milk is cooled on the farm, it may then be handled at a later hour. In our peak of the season we have been considerably embarrassed by the morning's milk having been rejected by the Boston Board of Health, due to the inability of our plant facilities to handle the peak volume before 9 A. M.

The granting of an extension of the license for Greenwich would enable us to take approximately 200 jugs off the load of the Eagle Bridge plant at the peak, and about 100 jugs of milk off the Salem plant at the peak of production. This would be invaluable in getting milk weighed and cooled and into the tank car under the time deal line as established by the Boston Board of Health.

[fol. 41] The second reason, and perhaps equally as important, is the fact that the granting of a license for establishing a plant at Greenwich would enable us to better serve the producers in that vicinity—a great many who already sell to us—by reduction in their trucking costs. We would hope to not only handle the supply of milk which we presently enjoy at our Eagle Bridge and Salem plants, but such other milk in that vicinity as might see fit to make its deliveries to us at that plant.

Q. In other words, several of your producers who currently deliver to you would be benefited if the Greenwich plant was opened in the way of delivery of their milk?

A. That is correct.

Q. Have you any idea how many producers?

A. I do not know. I gave you the number of jugs. Mr. Gould, our local representative, could give you more information as to the number of producers.

Q. You have recently enlarged the Eagle Bridge plant?

A. That is correct. We have recently modernized the plant and to some extent enlarged the capacity.

Q. What is it now equipped to do?

A. The same process that took place in the old plant plus the addition of cheese vats for the manufacture of cottage cheese, plus two powder rolls which may or may not be used for operations this peak. Ultimately there will be a powder operation at Eagle Bridge.

Q. What do you plan to do at Greenwich?

A. We plan to receive milk, weigh, sample, test, cool and ship as fluid milk from that plant. We do not contemplate manufacturing at that plant.

Q. If during the peak season it becomes necessary to [fol. 42] manufacture will those producers, who normally would deliver to the Greenwich plant keep on delivering there?

A. Yes. Those producers will deliver. There will be a year around operation at the Greenwich plant. There will be no conversion of producers to any other plant regardless of manufacture.

Q. Isn't it a fact that any producer that you take on or have at the present time will be kept throughout the entire year and not just taken during the short season?

A. It is. We contemplate a year around operation for the benefit of all producers at that point.

Q. Any surplus of fluid milk you will manufacture?

A. At some point, but not at Greenwich.

Q. I mean at some plant?

A. That is right.

Q. Is all milk delivered to your plant by the producers, or are arrangements made by the producers themselves?

A. That is correct—either by the producers or truckmen whom they hire for that purpose.

Q. Most of the milk will be sent to Boston?

A. Correct.

Q. Some will be diverted elsewhere?

A. No. We sell milk in the Boston market area so-called. Much of the milk may be sold to so-called secondary markets, but it is all Boston pooled milk.

Q. Is it the intention of the Hood Company to undertake expansion, repairs and improvement of the old Greenwich and Easton Farm Products Company's plant in Greenwich?

A. It is.

Q. Along what lines?

A. We contemplate extensive repairs to the plant as it exists in Greenwich, and also the installation of modern and [fol. 43] adequate machinery for the purpose of handling milk as outlined.

Q. Then, to sum it up, the purpose of the Hood Company is three-fold in this application. First—and this is not in the order of importance:

No. 1. To enable the Hood Company to meet their Boston Board of Health dead line.

No. 2. To afford a more available plant for its producers.

No. 3. To allow Hood to expand its operations in the vicinity of Greenwich.

A. That is right.

Mr. French:

Q. Where is the machinery coming from, Mr. Whiting, to equip this plant at Greenwich?

A. We have some of the machinery presently available, which will be from the Eagle Bridge plant, machinery of slightly lesser capacity than we contemplated installing. Some of the machinery is already on purchase, and some of it is salvaged in our Boston headquarters.

Q. All of this machinery when installed will have to meet the requirements of the Health Department in Boston?

A. That is correct.

Q. How much of an outlay will be involved in re-conditioning?

A. We estimate it will cost between \$40,000 and \$50,000 to make a proper receiving station.

Q. That includes the equipment you are going to have to purchase?

A. That is right, together with repairs on the building.

Q. Have Hood & Sons purchased the building or leased it?

A. No. We have an option on the building to purchase it.

[fol. 44] Q. You want to make this a permanent operation—not something as a stop gap because of the shortage of milk?

A. That is right—a permanent operation.

Q. Now you mentioned 300 cans of milk—200 that might be diverted from Eagle Bridge and 100 from Salem. Would that be the maximum receipt of milk at this plant, or do you anticipate and hope for new producers to come to that plant?

A. That is correct. We both anticipate and hope for new producers at the plant.

Q. Have you made a survey of the producers in the Greenwich area who are not now shipping to you to see how many you can obtain?

A. Sure.

Q. What is your finding?

A. I believe Mr. Gould estimates that we might receive 150 jugs in the short season more than the figures which we gave you.

Q. Making the total receipts in the short period about 450?

A. No. It will be in the short season about 350 jugs.

Q. Then the figures of 300 to be shipped from Eagle Bridge and Salem are not the short figures?

A. No. Those are the peak figures.

Q. What is contemplated as the peak capacity of the new plant?

A. We would have a plant capacity for handling and properly cooling and taking care of 800 jugs of milk a day.

Q. When you say "jug," you do mean a can?

A. As long as I am in New York, I mean a can.

Q. You do not know how many producers would be shipping this 150 cans that you hope to obtain in the Greenwich area?

A. No. Mr. Gould might be able to give that to you.

Q. Is Mr. Gould here?

A. Yes, he is.

[fol. 45] Q. You do not personally know where those producers are now shipping?

A. No. At least I do not know the distribution of shipments.

Q. How many of the present producers who are shipping to Eagle Bridge or Salem that you contemplate changing and shipping to this other receiving station will be benefited by a shorter haul?

A. There again I will have to refer that question to Mr. Gould.

Mr. French: That is all for this witness at the moment.

Mr. Titus: One more question.

Mr. Titus:

Q. Boston alone has been mentioned in connection with Hood. Hood operates throughout the New England States, does it not?

A. Correct.

Q. There are several outlets for the fluid milk?

A. We have 26 country plants, not counting the secondary market facilities which we have.

Mr. Titus: That is all.

The Chair:

Q. Mr. Whiting, I assume that your company pays the Boston Federal Order price for milk at these plants. Can you tell us for the record what that price is in terms of dollars and cents at Salem and Eagle Bridge.

A. There again, as to the price I would rather Mr. Gould would answer that. I believe it is \$3.64, but I would rather Mr. Gould would answer it.

The Chair: Are there any questions of Mr. Whiting?

[fol. 46] Mr. Rohlf: I would like to ask one question regarding the operations at Eagle Bridge.

Q. What are your contemplated plans with regard to the manufacture of cheese and powder there? What size operation do you intend to carry out?

A. Only a very small cheese operation there and powder roll facilities to take care of the week-end peak occasioned by the five-day delivery.

Q. Will the powder operation be an all year around affair?

A. No—probably not over six week-ends—not an all week operation.

Q. It is only during the flush season?

A. Correct.

Q. No further questions.

Mr. Mather:

Q. Are there any other facilities in addition to the cheese vats and powder rolls? What other manufacturing operations have there been at Eagle Bridge?

A. If I left you with the impression that they are manufacturing, they are not. What I mean is there would be fluid milk handling and that only.

Q. You said you had approximately 3,000 cans at the peak at Eagle Bridge. What would you get in during the low point?

A. About a thousand jugs.

Q. What is the capacity of the Eagle Bridge plant?

A. The contemplated capacity would be 40,000 to 60,000 pounds per hour. That is the new plant.

Q. Will you translate that into jugs or cans for me?

A. I guess so—about 500.

[fol. 47] Q. About how many producers are delivering to Eagle Bridge?

A. 400.

Q. What is the capacity of the Salem plant?

Mr. French: I think we had better get this from Mr. Gould.

Q. Do you know, Mr. Whiting, that the New York regulations also require delivery of the morning milk before 9:00 A. M., otherwise it must be cooled?

A. That is right—60 degrees temperature. Ours is 50 degrees.

Q. Can you tell me the number of jugs of milk that were rejected during the last 12 months period for being delivered after 9:00 A. M.?

A. No, I cannot. Mr. Gould can answer that. We had a substantial rejection of producers, but the number of jugs I could not say.

Q. Can you tell me what the trucking rates are at the Eagle Bridge or Salem Branches?

A. Yes. There is a range of 15 to 25 cents per cwt. in those plants.

Q. Approximately what territory is covered? In other words, how far out is the longest route from Eagle Bridge plant?

A. I would rather Mr. Gould would answer that.

Q. I think you have answered it, but I would like to get it again.

What is the proposed capacity of the Greenwich plant?

A. We plan to have a plant sufficient to handle 800 jugs of milk a day.

Q. An hour or a day?

A. 800 a day.

Q. Does the company plan having this plant under Federal Order No. 27 or is it going to be under Federal Order No. 4?

A. Federal Order No. 4.

[fol. 48] Q. Do you have any premium payments at either Eagle Bridge or Salem?

A. We do not.

Q. Do you contemplate any premium plan at Greenwich?

A. We do not.

The Chair: Is there anyone else?

Mr. Lamont:

Q. I would like to inquire what freight zone the proposed plant would be in under Federal Order No. 4?

The Chair: Possibly it would be well to have the record show that the Federal Order No. 4 is the Federal Order for the Boston Market.

A. I hesitate to answer that, sir. I think Mr. Gould either knows or could estimate it closer than I could. I do not know in what zone that does fall in Greenwich.

Q. Are you familiar with the construction of the milk plant at Eagle Bridge?

A. Yes—to some extent.

Q. Will you describe what facilities are being provided there for the receiving of milk from producers?

A. Well, we have a single intake. We do not have a double intake contemplated for that plant. As stated, it will have between 40,000 to 60,000 pound per hour capacity. That means the ability to handle that amount, cool it and put it in tank cars. That means a can washer sufficient to handle it, cabinet sufficient to cool it and pumps, etc.

Q. What capacity can washer are you installing?

A. We have, I believe, a 14 to 16 can a minute washer.

[fol. 49] Q. What is the capacity of the can washer in the present Eagle Bridge plant?

A. About a 12 to 14 can a minute washer.

Q. What storage tank capacity will you have at the new Eagle Bridge plant?

A. We will have 600 jugs storage at the new plant.

Q. Will you have any separate storage for skim?

A. We have a 100-can tank for skim storage.

Q. What storage facilities do you have or have you had at the Eagle Bridge plant that you are now operating?

A. We have not had storage facilities at that plant.

Q. As a plant operator, what can you say as to the effect of storage facilities and can washer capacity as affecting the efficiency of receiving milk as delivered by producers?

A. I can say this—that in the case of the Eagle Bridge plant we have not been bothered by lack of storage facilities in the plant since we have had tank car service and tank cars available for storage. The new can washer will, of course, step up the capacity.

Q. What facilities will you have for cooling milk in the new plant?

A. We have cabinet coolers.

Q. You are speaking of Eagle Bridge?

A. Yes.

Q. What will be the capacity per hour of those coolers?

A. 20,000 to 25,000 pounds each, and there are two of them.

Q. Per hour?

A. That is right.

Q. Will you compare that with the cooling capacity of the Eagle Bridge plant as now operating?

A. Eagle Bridge plant has about 35,000 pounds per hour [fol. 50] capacity at the present time with the coolers which we have.

Q. How many hours per day do you operate this plant normally to receive milk from producers?

A. The peak season or the short season?

Q. The peak season?

A. That plant starts its operations about 7 o'clock in the morning and continues to operate until 1:30 P. M.

Q. So that some of the milk that comes in is now cool—the morning milk is cool?

A. Correct.

Q. Is there a substantial proportion of it cool?

A. No.

Q. How many weigh cans will you have on the receiving deck at Eagle Bridge?

A. One. It will be a double compartment.

Q. How is milk delivered at Eagle Bridge for the most part—by motor truck?

A. That is correct. There is very little so-called self-delivered milk there.

Q. By self-delivered milk you mean milk delivered by the farmers by their own trucks?

A. That is right.

Mr. Lamont: That is all.

The Chair: Are there any other questions?

Mr. Steffen: Mr. Whiting states that some of this 300 cans is in the vicinity of Greenwich.

Q. Isn't it a fact that some of it extends pretty near as close to Eagle Bridge and Salem as it does to Greenwich?

A. I would rather Mr. Gould would answer that question. I am not familiar with the locations of the producers.

[fol. 51] Q. In your new plant you claim you will have a 14-can a minute washer and likewise capacity on your coolers. Isn't it a fact that it would only take 14 minutes to dump the 200 cans of milk you say you are going to divert daily to Greenwich. I am talking about the 200 cans of milk they want to divert from Eagle Bridge. With the capacity at the new plant at Eagle Bridge, it would take only 14 minutes to handle that.

A. I have not figured it out. Possibly the figures are not too accurate.

The Chair: Is there anything else?

Mr. Steffen: I understand there has been appropriated \$180,000 for this new plant?

Mr. Titus: What plant are we talking about?

Mr. Steffen: Eagle Bridge.

The Chair: I do not think there has been any testimony to that effect.

Mr. Steffen:

Q. Can you tell us what is appropriated by the company?

Mr. Titus: I object to that question.

The Chair: Sustained.

Q. What I have in mind—since this is such a modern plant—I understand it is to be completed this next month. Rather than going to the expense of an additional receiving plant, why not put in two receiving plants at Eagle Bridge?

Mr. Titus: Is that a question or a statement for the record.

[fol. 52] Mr. Steffens: A statement.

Mr. Titus: I move that it be stricken out.

The Chair: That statement will be stricken from the record.

Mr. Lalor:

Q. Mr. Whiting, at the present time are there any grade A producers shipping to Salem or Eagle Bridge?

A. No grade A producers.

Mr. Steffen:

Q. Isn't it a fact that during the shortage you offered premiums for Grade A milk and bought milk during this present shortage on premiums paid for Grade A?

Mr. Titus: I object unless it is restricted to some locality.

Q. In Eagle Bridge?

A. I have no objection to answering that. Yes, we purchased Grade A during the short season. That has been discontinued as of the present time. We still buy Golden Guernsey Milk at Eagle Bridge.

Q. This particular Grade A you paid up to 40 cents per cwt. on the basis of bacteria count—fat not considered.

A. That is correct.

Q. You offered that to various producers as an inducement to ship milk to that plant who were not shipping to your plant at that particular time.

Mr. Titus: I object to the form of that question.

The Chair: Ask him if he did do it for that purpose?

[fol. 53] A. Yes, we did.

Q. And now since the shortage is over, you discontinued it?

A. That is correct.

Q. You might do it next year during the shortage?

A. It is entirely possible. I hope so.

Q. You might offer that premium at Greenwich if you opened a new plant and was granted a license?

A. No, I think not, since it is common sense to secure that milk at the nearest point.

Q. If you offered it at Eagle Bridge, isn't it possible that you might offer it at Greenwich as an inducement?

A. We did not use it as an inducement. We offered it because we needed it.

Mr. Mather:

Q. It is true, is it not, that Boston like a great many eastern markets last fall was extremely short of milk?

A. That is correct.

Q. It is true, is it not, Mr. Whiting, that generally speaking the butterfat differential on the Boston Order is greater than on the New York Order? In making payments to producers at Eagle Bridge and Salem plants where the milk

tests above 3.7, which is the breaking point on the Boston Order, you pay the higher Boston differential for butterfat in excess of 3.7, and where it falls below 3.7 you deduct only the New York butterfat differential?

A. No, that is not true.

Q. You pay or deduct the same butterfat differential going up and down?

A. That is correct.

[fol. 54] The Chair:

Q. Is it possible for you to receive both Grade A and Grade B milk at the same plant?

A. No, it isn't. That milk had to go to Boston in the original container from the farm and be dumped at the Boston plant. It is not possible with the facilities we have to receive both.

Q. So that it would not be possible, as a matter of fact, at any of your plants to handle both Grade A and Grade B milk?

A. That is correct.

Q. The only way you can handle it is to ship it directly?

A. That is right.

Mr. Steffens:

Q. Didn't Mr. Whiting state that they did receive Grade A at Eagle Bridge?

A. I don't think so. I said we bought and purchased Grade A, which we did, and re-shipped it to Boston in the original containers.

Q. Where did you weigh it?

A. It was weighed in Boston.

Q. It was delivered at Eagle Bridge on the platform?

A. Delivered on the platform, but not put through the plant.

The Chair: Are there any more questions?

(No response.)

[fol. 55] At this time GEORGE L. GOULD was duly sworn, and testified as follows:

By Mr. Titus:

Q. What is your full name?

A. George L. Gould.

Q. By whom are you employed?

A. H. P. Hood & Sons, Inc.

Q. In what capacity?

A. Division Superintendent.

Q. What territory does it cover?

A. Country Division.

Q. What territory do you have?

A. Eagle Bridge, Salem, Bridgeport and Vermont.

Q. How long have you had that?

A. I have had Eagle Bridge and Salem over a period. I have worked for Hood 38 years.

Q. That is about since 1908?

A. Vermont—a couple of years up there—the last two years.

Q. You have been familiar with this section for the past 38 years?

A. Yes, sir.

Q. How long has Hood been in there?

A. Since 1901 or 1903. I forget which it is.

Q. You are familiar with the Eagle Bridge and Salem plants?

A. Yes.

Q. You are acquainted with the situation relating to the contemplated operation at Greenwich?

A. I am.

Q. Will you describe, perhaps in more detail than Mr. Whiting, what is done at the present time at the Eagle Bridge plant—how much milk is handled there, how many producers deliver and so on?

A. We have around 400 producers at Eagle Bridge, and it is running at around 235 to 250 at Salem.

[fol. 56] Q. The 400 producers at Eagle Bridge deliver how much milk?

A. Around one to two thousand cans.

Q. And at Salem?

A. About 50,000 to 100,000 pounds.

Q. As Mr. Whiting testified, if this application is granted and the Greenwich plant is reopened, certain producers

who now deliver to your other two plants will deliver to Greenwich?

A. That is right.

Q. From where will those producers come?

A. They are presently delivering to us: They live in Argyle, Greenwich, Saratoga section, Easton.

Q. The producers who will deliver to Greenwich will be closer to Greenwich than to either of the other two plants?

A. That is right.

Q. From how far north do they come?

A. From Argyle, Saratoga, Easton and right around Greenwich locally.

Q. How about Whitehall?

A. They would not come from there.

Q. There was quite some discussion referring to the Eagle Bridge plant as a new plant. Is that plant in operation today—the so-called new plant at Eagle Bridge?

A. It is not.

Q. When will that go in operation?

A. Sometime within 30 days probably.

Q. Are the alterations and improvements substantially completed?

A. Substantially completed.

Q. And they will go into operation within the next 30 days?

A. We hope to.

Q. In your opinion, how many producers which you now [fol. 57] have will benefit by the granting of this petition to open the plant at Greenwich?

A. 80 to 100.

Q. Will anyone have to deliver at Greenwich, or will they deliver at Greenwich where Salem or Eagle Bridge would be closer? In other words, is the producer going to be able to deliver to the plant most convenient to him?

A. That is right. He has his choice.

Q. It is up to him. You will not direct any producer to deliver to any particular plant?

A. That is right.

Q. Mr. Whiting stated that it is your intention to acquire additional producers for the Greenwich plant?

A. That is right.

Q. How many producers do you contemplate or do you anticipate you will acquire or attempt to acquire?

A. Why, we might possibly get 20 or 30 more that are in that area.

Q. Has someone interviewed them?

A. We have not interviewed them telling them that we were going to have a creamery at Greenwich. In the ordinary procedure of buying milk for our present plants, we see more or less of them.

Q. During the time that you have been connected with the milk industry in that area, isn't it a fact that this territory has been commonly known as the Boston Milk Shed?

A. That is right. Whiting operated a plant there for possibly 20 years or longer before he sold to the Dairymen's League. In fact, all of the territory from Johnsonville even where Gold Medal operates now, and clear over to Saratoga, where Dake operates, that territory was all developed by the Boston milk shed. Later on, back in the 30's Whiting sold out to the Dairymen's League, and that is one [fol. 58] thing possibly that makes the market short in Boston. They buy milk all the way from Johnsonville clear up through Danbury and up in Vermont. Whiting has possibly 6 or 7 cars a month going to the Boston market.

Q. It has been stated by Mr. Whiting that no matter how much milk you get from your producers during the peak season, you will buy that milk?

A. That is correct. We always have.

Q. How long has it been, or did you ever turn any producers loose after the short season was over?

A. It is not policy to do so.

Q. You have not done it?

A. That is right.

Q. If you take them you keep them if you can.

A. That is right.

Mr. French:

Q. What is the greatest distance that the present producers who will be changed to the Greenwich plant would have to ship their milk in order to get it into Greenwich?

A. You are speaking of the Greenwich plant?

Q. That is right.

A. It would cut the distance between Greenwich and Eagle Bridge in the neighborhood of 12 miles. They would save that much. We would probably go back to get the Eagle Bridge supply in some cases as far as 30 miles.

Q. You said the distance was 12 miles. You mean the saving would be 12 miles.

A. That is right.

There is a large proportion of that milk that comes from Saratoga across Schuyler Bridge that could drop off at Greenwich. They would save 12 miles. A lot of local dairies around Greenwich, and some of them near Buskirk, [fol. 59] and they would rather go to Greenwich. They might not save quite so much, but would save from 8 to 12 miles.

Q. Would you say that 15 miles would be the correct distance that any of them would haul going to Greenwich?

A. I would estimate that would more than cover it.

Mr. Titus:

Q. You are not going to tell anyone to change?

A. Did you ever try to tell a farmer to change?

Q. It is going to be optional with them where they deliver?

A. Correct.

Q. Now, if Hood did not anticipate that it would be a substantial saving to a number of their present producers, it would be folly for them to undertake this proceeding. Isn't that right?

A. Correct.

Mr. French:

Q. What is the greatest distance you are hauling to Eagle Bridge at the present time.

A. I would say 30 miles.

Q. How about Salem?

A. Well, it is barely possible that the White route is about 25 or 26 miles.

Q. You have not actually gone out and canvassed the farmers, telling them that you might have a plant at Greenwich, and asking them if they would ship there if you had a plant there? I mean new producers.

A. No, we have not gone out with that in mind. We have talked to the producers, saying that we might purchase the Greenwich plant so they could deliver there.

[fol. 60] Q. Your present producers?

A. Yes, and maybe some of the others. I would not say.

Q. Mr. Whiting testified there would be 150 cans of addi-

tional milk that might come in to the Greenwich plant locally in addition to the 300 cans you would take from Salem and Eagle Bridge. There has been no canvassing to assure that amount of milk. Is that right?

A. Not as yet.

Mr. Titus:

Q. But you will open a new plant if permission is granted, whether you get new producers or not?

A. Correct.

Mr. French:

Q. You feel that 300 cans is enough to warrant the opening of a new plant?

A. Yes, sir.

Mr. French: That is all at this time.

The Chair:

Q. Mr. Gould, can you tell us the actual dollar and cents price now being paid by Eagle Bridge and by Salem?

A. I think we paid \$3.66½ at Eagle Bridge for January, and Salem was \$3.65. That is for 3.7 per cent milk—up and down 8 cents on a point.

Q. Do you know approximately the butterfat content there?

A. The month of January around 3.9 at Eagle Bridge, and possibly 3.8 at Salem.

Q. Then, I think this would be an appropriate place to ask this question. What zone, if you know, would the Greenwich plant be in from Boston?

A. Eagle Bridge is in the 17th zone and Salem is in the [fol. 61] 19th. I should say that Greenwich would land either in the 19th or 20th zone. I will not say which.

Q. At this point, I wonder if you would have any objection if the Commissioner would take judicial notice of the provisions of the Federal Order No. 4 relative to price, transportation, zones, etc.?

Mr. Titus: I have no objection. I never heard of it until today.

Mr. Mather: I suppose that is also applicable to the provisions of Federal Order No. 27?

Mr. Titus: No objection.

The Chair: It is understood that the Commissioner may take judicial notice of Federal Orders Nos. 4 and 27, and I assume State Official Order No. 126.

Are there any other questions?

Mr. Rohlf:

Q. How far distant is it from the proposed plant at Greenwich to Salem—road distance?

A. About 10 miles.

Q. How far is the distance from Greenwich to Eagle Bridge?

A. About 12 miles.

Q. And you are going to pull some of the farmers in between those plants? In other words, 10 and 12 miles? Would you say 5 to 6 miles would be the dividing line?

A. In some cases it would depend upon where other plants are located.

Q. A good share of your farmers would save a distance of 5 or 6 miles on their hauling?

A. That is right.

Q. This 80 to 100 producers that you expect to change [fol. 62] from Salem and Eagle Bridge, where is the biggest bulk of them located?

A. About 200 cans are located right around Greenwich.

Q. You mentioned Argyle.

A. We have some in Argyle.

Q. How far is Argyle from Greenwich?

A. I would say 12 to 14 miles.

Q. How far is Saratoga?

A. The northern section of the country is just about practically the same.

Q. 14 miles?

A. Yes.

Q. What plant do they go to now?

A. The Argyle route goes both ways. One route goes to Salem and one to Eagle Bridge.

Q. How far is Argyle from Salem?

A. Well, I couldn't say exactly. I would say it is around 16 miles.

Q. How far is Argyle from Eagle Bridge.

A. About 20 miles.

Q. There is not too much saving in miles. You are going to save 5 or 6 miles—not much more than that. Am I correct in that assumption?

A. Some of them would save that.

Q. I am talking of the biggest bulk of the farmers. They would only save about 5 or 6 miles. Is that correct?

A. Well, the Saratoga stuff and the Argyle stuff would have 12 miles. They would save 12 miles.

Q. I understood from the figures that you gave me that the biggest bulk of them would save 5 or 6 miles on their haulage?

A. That is right.

Q. This 80 or 100 producers that you expect to take from the other two plants; about how many cans will they deliver a day?

A. Around 300.

[fol. 63] Q. In the flush season, how much will they deliver?

A. Probably 500.

Q. So these farmers that you take will run from 300 to 500 per day?

A. That is right.

Q. Your 80 to 100 producers?

A. That is right.

Mr. Mather:

Q. When your Eagle Bridge plant is completed, how much will the capacity be in comparison with its capacity last year?

A. I have not had anything to do with that. I have been busy in the country.

The Chair: I think that is on the record.

Q. Mr. Whiting, what is the increase in capacity at Eagle Bridge after the remodelling?

A. Before remodelling, the capacity was 35,000 pounds an hour.

Mr. Lalor (cont'g with Mr. Gould):

Q. Mr. Gould, I believe that Mr. Whiting testified that all hauling arrangements were arrangements made directly between the producers and independent haulers. Is that correct?

A. Correct.

Q. Could you tell me if the Hood Company ever paid any producers the hauling charge?

A. No. We do not do that. We used to years ago; but not in the last 10 or 15 years.

Mr. Lamont:

Q. Mr. Gould, what can you say as to the size of some of the larger loads that are moving into the Eagle Bridge [fol. 64] plant? What is the capacity in terms of cans of those loads during the flush season?

A. Around 100 cans.

Q. How many trucks are there that would bring in in the flush season in excess of 60 cans? Can you tell us?

A. I could not without figuring it out. I imagine we have about 10 routes that run above that.

Q. Now, if you build the proposed plant for which you are seeking the license here, how many men will it be necessary to employ at that plant to operate it according to the Boston Board of Health specified regulations?

A. I think around 3 or 4.

Q. That would include the manager?

A. Yes.

Q. What can you say as to the condition of the highway between Greenwich and Eagle Bridge?

A. Excellent.

Mr. Lamont: That is all.

Mr. Steffen:

Q. You have regulations in Boston relative to premises inspection of new dairies and your present dairies. I mean you have regulations.

A. Yes.

Q. When you make the inspections we assume that they are supposed to comply with them. Isn't that so?

A. When I make them?

Q. You or another inspector. When you inspect a dairy to ship milk to the Boston market, you are expected to come up to the measures prescribed by the Boston Health Department?

A. That is right.

Q. You do not require a veterinarian examination of the herds?

A. No.

Q. You do not have to keep any veterinarian certificates on file?

A. No, sir.

[fol. 65] Q. You just take on the dairy without any physical examination?

A. That is correct.

Q. Isn't it a fact that during the past year when the Boston City Health Department Inspector came you accompanied him to some of the dairies?

A. I accompany them to all of the dairies.

Q. Isn't it a fact that when you took on new dairies, if they didn't comply that they were told that if they were to make the compliance within 3 or 4 months that they could ship right off?

A. That is up to the inspector.

Q. I mean he did take milk on under those circumstances.

Mr. Titus: I object to that as immaterial to this proceeding, and it is questioning of something not within the personal knowledge of this man.

Mr. French: I will join in the objection.

The Chair: Objection sustained.

Mr. Lamont:

Q. Mr. Gould, is it not true that during the period which you described from 1900 down to date, milk has been produced in the vicinity of Greenwich, Salem and Eagle Bridge for the New York Metropolitan Milk Marketing Area?

A. To some extent. New York has been in Cambridge during that time. Saratoga and Greenwich, no. In the old days Whiting and Hood bucked each other all the way from Eagle Bridge through to Mechanicville, and the eastern milk went one way or the other.

Q. There is a New York approved plant at Buskirk?

A. Yes.

[fol. 66] Q. There is a New York approved plant at Ft. Edward, is there not? One owned by the Dairymen's League and one operated by the Middletown Milk & Cream Company?

A. Yes.

Q. Isn't there a plant at Saratoga Springs?

A. Correct. I do not know whether it is approved or

not. It was at one time, but I understood last year the New York Board of Health did not approve.

Q. You mean it may be approved for some other fluid market.

A. It may be.

Q. Isn't there a New York approved plant at Manchester, Vermont?

A. Yes.

Q. And at Granville, N. Y.?

A. There is.

Q. And at West Pawlet, Vermont?

A. There is.

Q. So that the New York and Boston milk sheds overlap each other in this general vicinity, do they not?

A. They do.

Q. Are there some producers in the vicinity of Buskirk, Eagle Bridge and Greenwich who deliver to the Capitol District Market.

A. There is.

Q. Is it not the general practice for a milk plant under present conditions of improved highways and motor transportation to serve a tributary area up to a 30-mile radius?

Mr. Titus: I object to that unless it is limited. I do not think this witness should be called upon to testify for all the other plants in the state. I have no objection to what the practices are at the plants.

Q. With respect to the practices at the plants operated by your employer, H. P. Hood, in this vicinity, is it not a [fol. 67] fact that these plants serve a tributary area having a radius up to 30 miles?

A. They do.

Mr. Lamont: That is all.

Mr. Mather:

Q. How far is it from Greenwich to Fort Edward?

A. I could not say exactly.

The Chair: At this point I am wondering if there would be any objection on anyone's part to the Commissioner taking judicial notice of all these distances between locations.

Mr. Titus: I would join in that. You mean independent—not on testimony here?

The Chair: Both.

Mr. Titus: I would like to ask some questions. Maybe I am wrong.

The Chair: Would it be agreeable if the Commissioner takes judicial notice of the actual road distances between the various localities mentioned?

Mr. Titus: No objection on my part.

The Chair: Is there any objection to the Commissioner taking judicial notice of distances of various milk plants in the vicinity of the proposed plant at Greenwich—at least within New York State?

Mr. Lamont: I believe we do have to go farther than 20 miles, because the consolidation of milk supplies for the purpose of efficient handling for the Capitol District can only be accomplished by the elimination of country plants [fol. 68] and the direct delivery by farmers of their milk to the plant at which it is to be bottled.

So far as Boston is concerned or New York, they are so far away that it is necessary to first deliver at a country plant, but so far as Albany, Schenectady, and Troy are concerned, if this is only a matter of driving in 10 or 15 miles with a motor truck on a concrete highway, economics dictate that that milk be hauled that distance to obviate the necessity of a separate country plant handling charge.

Mr. Titus:

Q. What is the longest distance away from Greenwich that you contemplate pulling milk?

A. I think 15 miles would be as far with existing plants.

The Chair: Unless there is objection, the Commissioner will take judicial notice of the milk plants which might possibly be affected by the operation of this proposed new plant.

Mr. Titus: No objection.

The Chair: Are there any other questions of this witness?

Mr. Titus: The statement of Mr. Lamont—that was purely a statement.

The Chair: It is purely a statement of counsel.

Mr. Titus: The petitioner rests.

The Chair: Now, those appearing in opposition.

Mr. Lamont: I will call Mr. Pratt.

[fol. 69] JACOB F. PRATT, being duly sworn, testified as follows:

By Mr. Lamont:

Q. What is your full name?

A. Jacob F. Pratt.

Q. Where do you reside?

A. Schaghticoke, N.Y.

Q. What is your occupation?

A. Farmer.

Q. Are you a member of a Dairy Farmers Co-operative Association that markets your milk?

A. Yes.

Q. What association is that?

A. Dairymen's League.

Q. For how many years have you been a member of that association?

A. About 18 years.

Q. For how many years have you been producing milk?

A. Well, I have produced milk more or less all my life, except for 8 years when I was off the farm, 1919 and 1927—from 1927 until now.

Q. To what market is your milk delivered?

A. My milk now is delivered to Troy. Formerly it was delivered to one of those Whiting plants that Mr. Gould spoke about.

Q. Are you an officer of any other farmer organization representing farmers in this territory?

A. I am a director of the New York State Farm Bureau Federation.

Q. Do you have any office in the Dairymen's League Co-operative Association?

A. Subdistrict president.

Q. For what geographical area?

A. For the counties of Washington, Rensselaer and Saratoga, and Rutland and Addison, Western Vermont, or all Vermont where we have plants.

[fol. 70] Q. Are you familiar with the organization of a milk supply for the City of Troy in so far as it is derived from Washington County, more particularly the vicinity of the Villages of Greenwich and Eagle Bridge?

A. Yes, I am fairly familiar.

Q. Does the City of Troy derive substantial quantities of milk from that territory?

Mr. Titus: I object to that question. It is too general. Also it is not shown to be within the knowledge of the witness.

Q. As one of the officers of the Dairymen's League, were you a member of any committee studying market conditions from month to month in the Troy and Capitol District markets?

A. I am a member of the Marketing Area Committee, that is, a Dairymen's League Committee representing producers.

Q. In connection with that work and in connection with your membership work, are you familiar with the location of the dairy farms in Washington County which are scored for the Troy market and deliver to that market?

A. I am.

Q. Are you likewise familiar with the organization of trucking routes by which that milk is delivered to plants in Troy?

A. Yes.

Q. And you have some idea or knowledge of the number of dairies in the southern portion of Washington County, and the northern portion of Rensselaer County, and in the vicinity of 12 miles north of that boundary and 5 miles south of that county boundary as to how many producers ship to the Troy area?

A. Yes. In that particular area?

Q. Yes.

[fol. 71] Mr. Titus: I object unless it is shown on what he is basing his estimate or figures here.

The Chair: He says he knows.

A. We have in that area, I think, approximately 150 Dairymen's League producers. I think there are in that area also approximately 150 at least other producers delivering to that area. Those are approximate figures.

Q. And all of those you say are approved for the Capitol District markets?

A. Right.

Q. Do you have a statement that you want to make at this time in connection with this application?

A. Yes.

I have lived in these counties and, as has been brought out, ship milk to the Troy area. For the last 12 years I have been fairly closely identified I believe with the milk market. I do remember back to the time when the Whiting plants were closed. We formerly shipped milk to the Whiting plants in Boston and it was because the demand, or one factor at least—the demand for direct delivery milk in the Capitol District areas as it increased was one of the factors in crowding Whiting back toward Boston. Another factor coming into the area was Gold Medal and Dellwood coming in there and buying milk and offering a more attractive market for the milk.

Mr. Titus: I must object to all statements of this witness for what was evidently so and apparently so, and as to these conjectural factors, and I move to strike them from the record. I mean statements like the witness just made, that [fol. 72] they apparently had to do thus and so. Unless the statements were made within the knowledge of the witness I must object.

Q. Did the Dairymen's League at one time acquire a plant and operate a plant at Greenwich, N. Y.?

A. Yes.

Q. Did the Dairymen's League conclude to close that plant some time thereafter?

A. They did.

Q. And when that plant was closed where was the milk thereafter delivered?

Mr. Titus: I object to that as too general.

Mr. Lamont: I submit it is not too general and I insist that it be answered; and I state this as the reason.

The producers are investing substantial sums of money in an effort to consolidate farms and plants in this territory and in the interest also of making milk available on direct delivery to the city markets in this area.

The Chair: You are assuming that the objection was to the general line of questioning. Is that right?

Mr. Lamont: Yes.

Mr. Titus: The question was what did they do with the milk after the plant closed. Where did the producers deliver the milk. I assume there were more than one or two producers, and I object to this witness testifying for every

producer who delivered milk to that Dairymen's League plant as not based within his knowledge.

[fol. 73] Mr. Lamont: I will withdraw the question.

Mr. Lamont (cont'g):

Q. Do you know of any producer who delivered to the plant at Greenwich who after it was closed, immediately thereafter, delivered to Troy?

A. Yes.

Q. Do you know of some in that vicinity who immediately thereafter delivered to Fort Edward?

A. No, I do not.

Q. Or some other New York approved plant.

A. There were some who delivered to that plant who delivered to the Dairymen's League plant at Cambridge, which was running then.

Q. Did there come a time when the Dairymen's League closed the plant at Cambridge?

A. Yes.

Q. Do you know of some producers who were then delivering to Cambridge who immediately thereafter delivered to Troy?

A. All of the producers then delivering at Cambridge were diverted to Troy with the possible exception of one or two, who left the Dairymen's League and went to other markets.

Q. Do you know of your own knowledge whether at the time that the Dairymen's League disposed of its plant at Greenwich whether or not it acquired a restricted covenant against the operation of that milk plant thereafter?

Mr. Titus: I object to that.

A. I know that it did.

Mr. Titus: It is in no way binding upon the applicant here and has nothing to do with this proceeding.

[fol. 74] The Chair: I do not see as it is binding upon this applicant.

I sustain the objection.

Mr. Lamont: Well, the producers in the interest of consolidating the milk supply for this territory, made a pecuniary sacrifice in discontinuing the operation of that plant and closing it as a milk plant, and, having made a sacrifice of that sort in the interest of consolidation of farms, it

is certainly a reactionary move to step into this same territory and re-establish a milk plant within this area.

The Chair: It may be true that the Dairymen's League made such an agreement, but it is certainly not binding upon this applicant or the Commissioner.

Mr. Lamont: None whatsoever.

The Chair: I sustain the objection.

Q. Can you describe the number of truck routes which run out of Troy into this vicinity?

A. The number of truck routes that run out of Troy?

Q. How many trucks are there which draw milk into Troy over Route No. 40 in the vicinity of Greenwich for the Dairymen's League producers?

A. For the Dairymen's League producers there are two on Route No. 40. I think a third one covers part of that route on its way into Troy. I know it.

Q. Are there truck routes which haul milk for the Dairymen's League producers from the vicinity of Eagle Bridge into Troy?

A. Yes.

Q. And over what route would that be and how many [fol. 75] trucks?

A. There are 3 that I know of. There may be more, but there are 3.

Q. Do other handlers in the Troy market to your own knowledge procure supplies of milk from that same general territory?

A. Yes.

Q. Is there milk of Dairymen's League producers in the vicinity of Greenwich and within a radius of 10 miles of Greenwich being delivered to a Dairymen's League plant at Fort Edward?

A. Yes.

Q. Have you any idea how many dairies within a radius of 10 miles of Greenwich would be delivering to Fort Edward?

A. I do not know offhand.

Q. Do you have any knowledge as to the adequacy or inadequacy of the milk supply for the City of Troy during the last short season—from October through June?

Mr. Titus: That calls for a yes or no answer.

Q. Do you have any knowledge with respect to the adequacy or inadequacy of the supply for the market?

A. Yes.

Q. Was the supply adequate or inadequate?

A. Inadequate.

Mr. Titus: I move to strike that out as a conclusion. No foundation has been laid for the statement or how he acquired the information.

The Chair: We will permit the answer to stay on the record with the understanding that he substantiate it.

Q. Does your Market Area Committee obtain information from time to time from the Dairymen's League Division [fol. 76] office in this market as to the relationship of available truck delivery supplies to current demands for the fluid market here?

A. Yes.

Q. Did you get such information and specific figures for the short period—November through January?

A. Yes. This has been discussed at our committee meetings regularly.

Q. Did there come a time this fall when the figures placed before your Capitol District Marketing Area Committee disclosed that truck delivery supplies were less than the fluid milk and cream demands?

A. Yes.

Q. What did the Marketing Area Committee direct be done to make supplies of milk available for the Capitol District Market?

Mr. Titus: I object to that as immaterial—what his committee did to make milk available.

Mr. Lamont: I submit it is pertinent.

The Chair: Only as it affects the proposed operation of this applicant.

Mr. Titus: What they directed to be done is objectionable. With all due consideration, what they directed may have been the worst thing to do.

The Chair: I sustain the objection.

Mr. Lamont: I would like to be heard.

The Court: What they directed be done is objectionable. What did they do—and even then just as to how it affects the proposed plant.

Q. What did you do to make supplies available?

A. The Dairymen's League is bringing in, and has been, right up to now, an average of 250 cans of milk a day from

[fol. 77] country plants—Fort Edward and Greenwich. We are also bringing 80 cans a day out of Fort Edward to Glens Falls, which is a direct delivery market. Some of those producers are right in the Greenwich area where this proposed plant is proposed to be built. It is common knowledge also that other plant milk was brought in here to supply the market besides what the Dairymen's League brought in.

Q. Is the immediate vicinity of Greenwich also within the so-called direct delivery area of the City of Glens Falls?

A. Yes.

Q. Do you know of producers who live within a 10-mile radius of Greenwich who actually deliver their milk direct delivery into the City of Glens Falls?

A. Yes.

Q. In order to procure milk for the Capitol District, what is the applicable ceiling price, if you know, which a dealer is permitted to pay to producers?

A. The ceiling price in the Capitol District Area for Class I milk is the New York blend plus the Albany freight rate plus 5 cents. The Albany rate I think is $3\frac{1}{2}$ cents, so the actual blend plus $8\frac{1}{2}$ cents is the ceiling price for Class I milk.

Q. Do producers delivering to New York approved plants in Columbia County receive a so-called locational differential?

A. Yes.

Q. In addition to the New York Market Administrator's uniform announced price for that area?

A. Yes.

Q. What effect does that have as to the availability of supplies for the Capitol District Market from that direction?

[fol. 78] Mr. Titus: I object to that as calling for a conclusion of the witness and being clearly within the province of the Commissioner to determine.

Mr. Lamont: It is his experience in studying market conditions and supplies for the Capitol District Market. I think it is pertinent. Obviously if they cannot get the milk from immediately south of the market, the market has got to go in a northerly direction to get adequate supplies.

The Chair: Does the witness know that that has been the case?

Q. Do you know that the competitive factor has affected the availability of supplies?

A. Yes, I do. I know that the Dairymen's League has just lost 2 producers to go to that market. The south end of Rensselaer County has a lot of milk that goes down in Columbia County. I know a number of those dairies that transferred from this market and go to Columbia County, so we are limited on the south.

Q. Prior to the establishment of O.P.A. ceilings and for a number of years, did the Dairymen's League pay a direct delivery differential to cover part of a long distance hauling cost into upstate markets, including the Capitol District Market?

A. Yes, they did.

Q. What was that amount?

A. It varied in different years. Immediately before O.P.A. came in, it was a fifteen cents differential on all milk. Before that it was a thirty cents differential, but that included a production program along with it.

[fol. 79] Q. Is it possible now to pay a direct delivery differential under O.P.A. ceilings?

Mr. Titus: I object to that as immaterial.

The Chair: I do not see as it is material.

Mr. Titus: That is a general condition, I assume. I do not know.

The Chair: You would be willing to agree that is not possible—that they cannot pay it?

Mr. Titus: I assume they cannot—that the O.P.A. will not let them.

A. And the returns of the market will not let them either with the ceiling.

Q. So that handlers in the Capitol District Market and handlers in the New York Market under O.P.A. ceilings are in a better position to compete for supplies near by the Capitol Market by reason of the temporary, we hope, ceiling price applicable to producer returns in this area for direct delivery milk?

Mr. Titus: I object to the form of the question as calling for a conclusion by the witness as to whether any one is in a better position than any one else.

The Chair: I think there are facts enough on the record so that the Commissioner can draw a conclusion, and I sustain the objection.

Mr. Lamont: That is all.

The Chair: Any questions, Mr. French?

Mr. French: I will reserve the right to question pending questions by Mr. Titus.

[fol. 80] By Mr. Titus:

Q. You have trucks that draw directly from the Eagle Bridge Farm Area?

A. We have. I am a little at sea as to what you term "Eagle Bridge Farm Area." Those trucks extend all over.

Q. You testified as to the Greenwich Area. Do you have producers in the Greenwich Area?

A. Right.

Q. You have them also in Salem?

A. Right.

Q. To what extent? Within a radius of how many miles of Salem?

A. What do you mean—does the farm area extend?

Q. Yes.

A. Mr. Gould, I believe, testified 25 miles.

Q. You agree with him?

A. Yes, I agree with him.

Mr. Titus: That is all.

Mr. French: I have no questions.

The Chair: Has any one else any questions?

(No response.)

The Chair: Mr. Rohlf, do you want to present your witness?

Mr. Rohlf: I will call Dr. Tompkins.

DR. TOMPKINS, being duly sworn, testified as follows:

Mr. Rohlf:

Q. Give your name and address?

A. Andrew J. Tompkins, Middletown, N. Y.

Q. You are in the employ of Sheffield Farms?

A. I am.

[fol. 81] Q. In what capacity?

A. District Superintendent.

Q. Does the district of which you have charge take in the plant at Cambridge, N. Y.?

A. It does.

Q. How far is Cambridge from Greenwich?

A. Possibly 10 or 12 miles.

Q. At the plant at Cambridge you take milk from how many farmers living in the vicinity of Greenwich?

A. About 20.

Q. About how many cans of milk a day is that?

A. Approximately 80.

Q. At the present time how many cans of milk are you taking?

A. 350.

Q. What is the capacity of the plant?

A. 600.

Q. In your opinion, there is plenty of capacity to take more farmers at the present time?

A. That is right.

Q. How long has the plant been at Cambridge?

A. I would say approximately 30 years.

M. Rohlf: No further questions.

Mr. Titus:

Q. Counsel asked you how many cans you got from the Greenwich vicinity. Does that include Eagle Bridge and Salem?

A. It does not. Greenwich vicinity would be, I believe, east of Greenwich and adjacent to there.

Q. How many miles radius?

A. I would say that we are getting this milk from 6 or 8 miles—6 miles.

Mr. French: No questions.

Mr. Rohlf: I would like to make a statement. First, as [fol. 82] Mr. Tompkins has testified, our plant is running well under capacity. We could take more farmers ourselves. The farmers in that vicinity are adequately served. If another plant is located in Greenwich, it looks like it will be destructive competition and certainly will not aid market conditions. The farmers have an adequate number of plants to receive their milk, and I think another plant will cause unstable conditions in the market. That is our reason for opposing the application.

Mr. Mather: I will call Mr. Wedeen, vice president, Middletown Milk & Cream Company.

MR. N. WEDEEN, being duly sworn, testified as follows:

By Mr. Mather:

Q. In what capacity are you employed?

A. Executive, vice president.

Q. You are in charge of country plants?

A. I am.

Q. Does the Middletown Milk & Cream Company operate a plant at Fort Edward?

A. Yes.

Q. That is how far from Greenwich?

A. Approximately 12 miles.

Q. Do you have routes running out of the Fort Edward plant down towards Greenwich?

A. Yes, we do.

Q. Approximately how many routes?

A. About 3.

Q. Have you prepared a table or chart showing the number of producers delivering milk to Fort Edward, N. Y., plant for January, 1941, to March, 1946, together with average daily milk receipts showing the high and the low for the years 1941 through 1945?

A. That is right.

Q. That was prepared under your direction and supervision?

A. Yes.

Q. From the books and records of the Middletown Milk & Cream Company's plant at Fort Edward?

A. Yes.

Mr. Mather: I would like to offer that in evidence and ask the witness to comment on it.

Mr. Titus: I object to the admission of this in evidence on the ground that there is nothing on these charts to show where the milk comes from.

Q. Where is the milk delivered to?

A. The milk is delivered to the Fort Edward plant.

Q. Routes running out of the Fort Edward plant?

A. That is right.

Q. Three of which I believe go down towards Greenwich?

A. That is right.

Mr. Titus: I still object on the ground that there is noth-

ing to show on the charts what comes from Greenwich and what comes from some other area.

Mr. Mather: It is being offered to show that the capacity of the Fort Edward plant has by no means been reached and that the area in question is adequately served.

The Chair: Do you still object?

Mr. Titus: Yes. I assume in the light of counsel's last [fol. 84] offer that it will be received, if received at all, only to show as to the question of the capacity of the plant.

Mr. Mather: And that the area is adequately served within the meaning of the statute.

The Chair: I am going to overrule the objection and receive the tabulation and chart in evidence as to the number of producers and what information there is as to the volume of milk delivered at the Fort Edward plant from all sources.

Mr. Titus: May I have an exception?

The Chair: The tabulation will be marked Exhibit No. 6-A and the chart Exhibit No. 6-B.

Q. What was the number of producers delivering to the plant in January, 1941, as shown by the chart?

A. 295.

Q. What was the number delivering in March, 1946?

A. 214.

Q. Last year what was the low intake?

A. 1945 was in November—44,960 pounds.

Q. And the highest?

A. The highest intake was in 1942—June, 91,499 pounds.

Q. And in 1934, how many producers were delivering to the Fort Edward plant?

A. In August, 1934, we had 593 producers.

Q. What did they deliver at the high point?

A. At the high point of June they delivered 160,455 pounds.

Q. So that at the low point in 1945 you were taking in almost exactly one-half of what you took in at the peak period?

A. That is right.

Q. And you are equipped to handle as much as 160,000 pounds a day if you could get it?

[fol. 85] A. We could handle that and I think a little bit more.

Mr. Titus:

Q. Not all of this milk comes from the Greenwich area, does it?

A. No.

Mr. Mather:

Q. How many routes run out of the Fort Edward plant?

A. Twelve. I am not sure.

Q. And about the same number of producers on each route, or do they vary?

A. Well, they vary.

Mr. French: No questions.

Mr. Titus:

Q. How far did you say that your plant is from Greenwich?

A. Approximately 12 miles.

Q. In what direction?

A. North of Greenwich.

The Chair: Anything else?

(No response.)

Mr. Mather: I will call Mr. Burke.

JOHN W. BURKE, being duly sworn, testified as follows:

Mr. Mather:

Q. What is your full name?

A. John W. Burke.

Q. Where do you live?

A. Middlebury, Vt.

Q. You are employed by the Vermont Milk & Cream Company?

A. Yes, sir.

[fol. 86] Q. In what capacity.

A. General manager of country dairies.

Q. Is the Vermont Milk & Cream Company dairy plant at West Pawlet, Vt.?

A. Yes.

Q. How far is that from Greenwich?

A. In the neighborhood of 18 or 20 miles.

Q. How many producers are delivering to the West Pawlet plant?

A. 145.

Q. What did that plant take in at the high point last year?

A. Right around 900 cans.

Q. And at the low point?

A. About 450.

Q. What is the plant capacity?

A. 1,200 cans.

Q. Do any of the producers living in the vicinity of Greenwich deliver to the West Pawlet plant?

A. Not within 12 or 14 miles.

Mr. Titus: Then I move to strike out all of the previous answers of this witness, inasmuch as there are no producers within 12 or 15 miles of Greenwich.

The Chair: Supposing we leave the testimony of the witness in and the Commissioner will use his discretion whether or not he may wish to use it.

Mr. Mather: That is all.

Mr. Titus:

Q. Where do the most of your producers come from, Mr. Burke?

A. Rupert, Vt., and Granville, N. Y.

Q. Granville is close to the Vermont line?

A. Yes, and Middle Granville, and we have milk coming from the Smith Basin shed.

Q. The bulk of your milk comes from Vermont?

A. No—from New York State—around Granville.

[fol. 87] Q. There are no producers within 12 or 15 miles?

A. That is as near as I understand.

Mr. French: No questions.

The Chair: Mr. Buhrmaster, have you something to say?

A. E. Buhrmaster, Scotia, N. Y., President of the Schenectady Dairy Council and appearing for them.

I am appearing here objecting to the granting of this petition on the grounds that the number of miles between our marketing area and Greenwich are such that our supply, or a great deal of it, at Schenectady comes from the northern country. Our supply during the latter part of the year

1945 was inadequate. In our particular case only 90 per cent of the milk was delivered. In other cases it was considerably less than that. Our cream sales were out for two months. Our situation was relieved somewhat by milk that we understood come from north of us.

Mr. Titus: I move to strike out what he understood came from the north as not being within his own knowledge.

A. I am going to say that some of it came from the north of my own knowledge.

Mr. Titus:

Q. How far are you from Greenwich by road or highway?

A. Well, if any one knows how far it is from Saratoga to Greenwich. I would say around 30 or 35 miles.

[fol. 88] Q. And the conditions to which you just testified about cream being out and so on were pretty general throughout all the cities of the east?

A. Yes.

James M. Strang, Esq., of Counsel for John P. Weatherwax, Esq., Troy N. Y.

I will call Edward McClellan.

EDWARD McCLELLAN, Salem, N. Y., being duly sworn, testified as follows:

By Mr. Strang:

Q. Where are you employed?

A. Washington and Rensselaer County Co-operative Association, Cambridge, N. Y.

Q. In what capacity are you employed there?

A. I am field and plant representative for the co-operative.

Q. Do you wish to make a statement in opposition to the granting of a license for the operation of a plant at Greenwich, N. Y.?

A. I do, representing the co-operative.

The Washington and Rensselaer Counties Co-operative which is located at Cambridge and producer members are delivering milk to Gold Medal Farms at Buskirk, N. Y. The plant to which they are delivering has ample facilities for handling all present and anticipated milk increase and the area is adequately served by ample trucking facilities.

In making a recent survey as far as possible from our office, we found that approximately 100 producers of the association [fol. 89] are located in the Greenwich area, or within a radius of 10 miles, and if a plant were to be located in Greenwich, it would perhaps be in the center of our locality and would tend to take away some of those producers and shorten the milk supply to local markets and also to the Metropolitan area, and with perhaps less dairy or health regulations in the Boston market, they being less rigid than the New York market, might also tend to take some producers.

With the present plant facilities and the location of the Buskirk plant, the association opposes the issuance of an extended license for this area.

Mr. Titus:

Q. You say that the New York regulations are more rigid. Do you know what the minimum temperature for the morning milk is for New York?

A. 60 degrees.

Q. Do you know for Boston?

A. I believe 50 degrees.

Q. That would be the other way around in that instance?

A. On other measures which I am familiar with from the farmers' standpoint I know they are more rigid, and from the veterinarian's standpoint and from the condition of market equipment and farm regulations regarding milk houses and other conditions of the premises inspection,

Q. Who do you represent—the Washington and Rensselaer Counties Producer Co-operative?

A. That is right.

Q. Do all the producers of that co-operative deliver to one plant?

A. Yes, that is true.

Q. What plant is that?

A. Gold Medal Farms, Buskirk.

[fol. 90] Q. Who owns Gold Medal Farms? Your producers do not own it?

A. No. The association contracts the producers to Gold Medal Farms.

Q. You are speaking for your producers and not for Gold Medal Farms?

A. That is right.

Q. Your producer association might benefit by this plant, might it not?

A. Not under our particular New York setup with our association, no.

Q. In other words, you have a contract with Gold Medal Farms. Is that what you mean?

A. No, but I mean from the co-operative angle, I am speaking from. We would not be able to maintain our revenue by splitting up our co-operative.

Q. In other words, you want to deliver as a body, and not have so many delivering to Greenwich and some to Gold Medal Farms?

A. That is true.

Q. Even though it might benefit the producers near Greenwich to deliver to Greenwich instead of to Gold Medal Farms?

A. We are looking out for the producers—for the benefits to them, and we can see no benefit because the plant where we are already delivering is so geographically situated for trucking.

Q. There might be some of your producers to whom it might be much more convenient to deliver to Greenwich?

A. That is right.

Mr. Titus: That is all.

Mr. French: No questions.

Mr. Strang: I will call Mr. Steffen.

[fol. 91] PAUL STEFFEN, JR., being duly sworn, testified as follows:

Mr. Strang:

Q. You are employed by whom?

A. Gold Medal Farms, Inc.

Q. They have a plant at Buskirk, N. Y.?

A. They do.

Q. Is your work in connection with the plant at Buskirk?

A. I am plant manager.

Q. Do you wish to make a statement at this time regarding the extension of the operations of a plant at Greenwich?

A. I do.

This plant at Buskirk is a manufacturing plant, and we

can handle up to 3,000 can of milk a day. We employ in excess of 20 men and up to 30 men during the flush in the processing and handling of milk delivered to Buskirk. During the recent shortage we manufactured practically no milk at Buskirk, but we maintained our pay roll anticipating the flush period, when we could handle the surplus or the increased volume. If the volume of the plant is reduced, it would not pay us to maintain it as a manufacturing plant.

The location of the proposed Hood plant at Greenwich, N. Y., is a territory where we receive milk from approximately 100 producers delivering approximately 400 cans of milk daily to Buskirk. We have nine trucks delivering milk in and around that particular area to Buskirk.

Approximately ten years ago the Whiting Company of Boston maintained plants at Johnsonville, South Cambridge, Archdale and Greenwich. In the interest of the consolidation of plants, these plants have since closed.

[fol.92] Mr. Titus: I move to strike out the last statement as not being within the knowledge of the witness—the reason for closing. I do not mind the fact that they closed.

The Chair: The reason as to why the plants were closed may be stricken from the record.

Mr. Steffen (continuing): It is a fact that while it might save a slight trucking expense to some producers who might go to the proposed plant, it would demoralize the trucking facilities that now deliver to the Buskirk plant.

There is a New York City Health Department regulation which prohibits what we call uninspected milk to be on the same truck with inspected milk. By inspected milk we mean that inspected for New York City consumption. But uninspected milk—milk for any other market—our Health Department doesn't permit us to have that milk delivered on the same truck. In other words, if a truckman had milk for delivery to a Hood plant. The truckman would lose part of his load and in most probability would discontinue the hauling of milk due to the lesser revenue. It would not pay him to run it.

The bacteria requirements for the Boston market, according to their statement here, is 400,000 per cubic centimeter. We are limited by the New York Health Department to 150,000 microscopic.

We are also required to have each of our producers submit a veterinarian's certificate showing the physical in-

spection of the herds, which necessitates a return by the veterinarian where he finds a condition that requires the [fol. 93] treatment of the cows. This is a considerable expense over a course of a year to the producers where the veterinarian has the right to condemn a cow for various reasons, after which we are not permitted to accept milk from that particular producer.

We are permitted to pay no premiums for grades of milk on the New York market. The Boston market permits premiums for grades up to 40 cents per hundred on the basis of the bacteria count regardless of the fat content. This would create a demoralizing competitive situation in our area.

The Health Department have now issued a regulation which will increase the minimum size of a milk house as required on each producer's premises. That of a producer with 1 to 12 cows, 60 square feet, inside measurement floor area to 120 feet, inside measurement floor area. We have been instructed to go to each producer who does not qualify and get the producer's signature to the effect that he will have constructed a new milk house by the fall of 1946. We, in turn, must sign an agreement for the responsibility to see that the milk house is built, and if it isn't built by that time, we are to exclude the dairy from shipping to any New York-approved plant.

As a requirement concerning New York dealer operations. There are some very large cattle dealers who produce large quantities of milk, and we are under restrictions in connection with these operators—

The Chair: I judge that what you are trying to do is set [fol. 94] forth some of the requirements of the New York City Health Department. Is that it?

Mr. Steffen: Exactly.

The Chair: It seems to me if we are going to make comparisons between requirements of the Boston Health Department and the New York City Health Department that that would be a study in itself, and it does not occur to me—while I am not ruling it out now—that the Commissioner can go into that in very great detail.

Mr. Steffen: The purpose is to show that we have got to live up to these requirements and they are not required in Boston. I know from past experience that we are going to

lose a lot of milk to the Boston market. We have had to live up to regulations and they have not.

The Chair: Can we not state here that if the Commissioner feels that is an essential part of the facts to be considered that he can obtain the Health Department regulations and take judicial notice of them.

Mr. Titus: I hate to enter into any such stipulation as that. I do not see as it has any bearing on this proceeding. Where testimony is given by statement, it is very difficult for anyone on the other side to object to it. If I were to object to all the objections in that statement which I consider objectionable, it would take a long time, and so, for the purpose of the record, I would like to move to strike out [fol. 95] any testimony given by Mr. Steffen based on records which he has apparently been consulting, statements which are not in evidence, setting forth various requirements of various agencies, associations, etc., in this state as compared with those in Massachusetts as having no bearing on the issues before the Commissioner.

Mr. Strang: I thought they would be relative on the grounds that Mr. Steffen is trying to show a comparison, which I believe you said would entail a great length of time, between the conditions required by the Boston Market and those required by the New York Market. However, I do think it is relevant in this case because it would create unfair competition with the different restrictions.

Mr. Titus: I will have to put Mr. Whiting back on the stand and show where the Massachusetts regulations are tougher than the New York regulations.

The Chair: I will sustain the objection to that sort of testimony on the grounds that in order to make a complete comparison it would be almost physically impossible to do it here today, and whether or not such a comparison would be necessary to decide the issue in this matter is in question. I am going to sustain the objection and leave the testimony of Mr. Steffen that is in there now for what the Commissioner may feel it is worth.

Mr. Titus: May I respectfully request an exception?

The Chair: Yes.

[fol. 96] Mr. Titus:

Q. How many trucks did you say you have hauling to your plant at Buskirk?

A. Possibly 30.

Q. How many come from the Greenwich area?

A. About 8 or 9.

Q. Is that all within 10 miles of Greenwich?

A. Within about 15 miles.

Q. Who pays the trucking charges on milk delivered to you?

A. The farmers.

Q. Do you give any trucking subsidies?

A. We do.

Q. What are they?

A. We give a man here and there in some cases where competition warrants it—where ~~blood~~ ^{blood} has gone in and offered premiums we do it to retaliate.

Mr. French: I object to that. The answer is not responsive.

Q. Do you give them?

A. Yes.

Q. What did you say was your total number of truckers?

A. Possibly 25 or 30.

Q. Of the 25 bringing to you, how many at the present time are getting any subsidies?

A. Very few.

Q. Five?

A. Ten or fifteen.

Q. Maybe fifteen?

A. Maybe fifteen.

Q. In the past, referring to the same truckers, was some subsidy given to them when they first started to bring in the milk?

A. How long ago?

Q. We will start out within the last year?

A. Yes.

Q. How many?

A. Ten or fifteen.

Q. How much does that subsidy amount to?

A. It varies.

[fol. 97] Q. What is the amount?

A. It varies in comparison to what other people offer.

Q. What was the amount of subsidy you gave in the last year?

A. Twenty cents, the amount of the hauling.

Q. That is the complete cost of the hauling?

A. That is right.

Q. I assume that over a period of three or four years back of that other truckers who delivered to you got the same subsidy or some sort of subsidy?

A. I would not say that. We had to meet competition during the short period. We have to do something to protect the truckmen as well as ourselves. We had one instance. Green came to me and said, "Hood offered me 40 cents for my milk."

Mr. Titus: I move to strike out anything that was told to him as being hearsay. I move to strike it out.

The Chair: Objection sustained.

Q. You stated that were the Greenwich plant to open, your truckers would be inclined to give up their routes because they could not carry Hood milk and your milk on the same truck.

A. That is correct.

Q. What are they doing now around Eagle Bridge and Salem?

A. They are doing it now. The restriction was lifted during the shortage. Now the Health Department has issued an order to discontinue.

Q. When does that go into effect?

A. April 1.

Q. The situation will be no different with trucks from Greenwich than with trucks from Eagle Bridge and Salem?

A. I do not know what you mean.

[fol. 98] Q. Your truckers will lose the milk?

A. We assume so.

Mr. Titus: That is all.

Mr. French:

Q. How many producers do you actually get from this so-called Greenwich area—15 mile radius?

A. About 100. Our plant is not nearly run to capacity. We have maintained a pay roll all winter to take care of any surplus, and we are in a position to handle any amount of surplus in that area.

Q. What is your total plant capacity?

A. We can handle 3,000 cans.

Q. What was your peak in the flush season of 1945?

A. We got in about 1500 cans of our own milk.

Q. What do you mean by "our own milk"?

A. Milk directly delivered to the plant at Buskirk. We operate another plant at Middletown Springs and we take the output of that plant and during the surplus period they ship me about 600 cans to manufacture at Buskirk.

Q. Direct delivery is all we are interested in.

A. There was a time last year when we had up to 2200. We have lost producers and we are now handling less than 1,000 cans. Our peak will be about 1400 or 1500 this year.

Mr. French: That is all.

[fol. 99] WILLIAM GREEN, being duly sworn, testified as follows:

Mr. French:

Q. What is your full name?

A. William Green, Jr.

Q. Where do you live?

A. 1701 Union St., Schenectady, N.Y.

Q. What is your business?

A. Milk and ice cream.

Q. You operate a regular dairy business?

A. That is right.

Q. Do you buy direct from producers?

A. That is right.

Q. How long have you been doing that?

A. Since 1927.

Q. Do you have a statement that you wish to make opposing the granting of this extension?

A. Yes.

We buy milk through Elnora, Johnsonville, and East Lyon.

Q. All Saratoga County?

A. We go within five miles of Saratoga on the south side. Hood is down in that territory now.

Q. What do you mean "down in that territory"? Have they been soliciting business?

A. Yes, and that is within five miles of Schenectady. We feel if this is granted for Greenwich, they will soon go to Johnsonville.

Q. What about this five miles—

A. Through Elnora and Johnsonville.

Q. Johnsonville is more than five miles of Schenectady. Are you talking about the town or Hamlet of Johnsonville?

A. From Aqueduct Bridge is where Schenectady starts, and from there to Johnsonville I believe is five miles.

[fol. 100] Q. How far is it from the City of Schenectady, where your plant is, to those producers who have been solicited?

A. Seven miles.

Q. Your plant is only two miles from Aqueduct Bridge?

A. That is right. Our producers were shut out for unsanitary barns.

Q. You had some producers who were shut out by the Schenectady Board of Health because of unsanitary conditions?

A. That is right, and they were notified to be cleaned up in 10 days, and the very next morning this milk went to Hood.

Mr. Titus: I move to strike that out as not being within the personal knowledge of this witness.

A. It is within my knowledge. I was out there and tried to get the farm back to my plant.

Q. Did you see it go to Hood?

A. I did not see it go to Hood. I did see his milk checks.

Mr. Titus: I still move to strike it out.

The Chair: I sustain the objection.

Mr. Titus: I move to strike it out.

• The Chair:

Q. In the case of those producers, you say that you saw checks that they received from the Hood Company?

A. Yes.

The Chair: You have no objection to that, have you?

Mr. Titus: I object to that on the grounds that there is no proof as to what the checks were for.

[fol. 101] A. We are restricted by O. P. A. on butterfat and things that we can pay, and these producers go to Hood and it is impossible for us to hold them. Our milk has been cut down 50 per cent in our local area.

Mr. Titus:

Q. These producers that you lost that were closed by the Board of Health, how many were there?

A. Two.

Q. Isn't it a fact that if they did go to some other dealer that they were not accepted and allowed to deliver to that dealer until two weeks later, and not the next day?

A. That is not true. They were taken the next day.

Q. How do you know?

A. I was there to see if he was getting his barn in shape.

Q. You mean the farmer told you that?

A. I saw his statements. He started the very next day. He still has them in his files.

Q. Who is "he"?

The Chair: It is not pertinent to this hearing to know the name.

Mr. Titus:

Q. As a matter of fact, of your own personal knowledge you don't know whether they went to anybody else or to whom they went?

A. Yes, I do. I was there and saw their truckman pick it up.

Q. Whose truckman?

A. Hood's.

Q. How do you know it was their truckman?

A. How do you know who you are?

[fol. 102] At this time JOHN W. CLAYDON, was duly sworn, and testified as follows:

Mr. French:

Q. Are you connected with the Troy Area Dairy Council?

A. I am appearing for the Troy Area Dairy Council.

Q. What is your address?

A. R. F. D. No. 4, Troy.

Q. And the Dairy Council's address?

A. 1531 Sixth Avenue, Troy.

Q. What does the Dairy Council consist of?

A. It consists of about 90 per cent of the plants in the Troy area.

Q. What position do you hold with the Council?

A. Executive Secretary.

Q. How long have you held that position?

A. Four months.

Q. How long has the Council been in existence?

A. About 8 months.

Q. Were you authorized by the Council to appear here today to oppose the granting of this extension?

A. I was.

Q. Proceed.

A. We are appearing to oppose the granting of this extension due to the fact that there has been a shortage of milk in the Troy area since last fall, when it was necessary to curtail deliveries of approximately 10 per cent and there was no cream. The granting of this license would further put us in a bad position due to the fact that there is only approximately 25 miles between Troy and Greenwich, and naturally if they took on some producers they would take some producers from the Troy area.

Q. How do you arrive at the conclusion that it would be [fol. 103] from the Troy area?

A. Some plants in Troy now are getting milk in that vicinity.

Q. You do not want to lose any producers now shipping to Troy plants?

A. That is right, because at the present time there is a shortage of milk, and if they lost more it would be just that much more acute.

Q. Do you know how many producers your Council purchase milk from?

A. No, I do not.

Mr. Titus:

Q. Do you know how many dealers purchase milk from producers in this area?

A. No.

Q. Then you don't know how many cans of milk they get from producers in this area?

A. No.

Q. You do not know how many producers they have in this area?

A. They have some, but I cannot say the exact number.

Mr. Titus: That is all.

Mr. Lamont:

Q. One dealer, who is a member of your association, recently purchased a country plant in the vicinity of Bacon Hill?

A. One of the members purchased a country plant, yes.

Q. Do you know whether that plant is now scored for the Troy market?

A. No, I do not.

Q. Do you know of your own knowledge whether that plant is to be used, assuming that a license can be obtained, to supply milk to the Troy market as a country plant?

Mr. Titus: I object on the grounds that he has already said he did not know.

[fol. 104] The Chair: Objection sustained.

Mr. Lamont: The operator of that plant is not here.

The Chair: He was here and left.

Mr. Lamont: It seems extremely important to this issue that some distributors in this market are going to the extreme of inefficiency by actually acquiring country plants—

Mr. Titus: I move that that statement be stricken from the record as having nothing to do with this proceeding.

At this time DAVID R. LALOR was duly sworn and testified as follows:

Mr. French:

Q. What is your full name?

A. David R. Lalor.

Q. What is your business?

A. I am employed by the General Ice Cream Company in Schenectady.

Q. In what capacity?

A. As Milk Marketing Specialist.

Q. How long have you been so employed?

A. For approximately six months I have been with them.

Q. Were you authorized to appear here by that company to oppose the granting of this extension?

A. I am.

Q. Do you have a statement that you wish to make?

Mr. Lalor: Section 258-c of Article 21 of the Agriculture [fol. 105] and Markets Law of the State of New York requires in part that the Commissioner must satisfy himself that the issuance of a license will not tend to destructive competition in a market already adequately served, and that the issuance of the license is in the public interest.

Section 258-k of the same law requires that the Commissioner insure an adequate supply of milk for the inhabitants of this state and at the same time protect the dairy industry of the state.

In view of the shortage in the Capitol District with respect to milk and cream in the past two years, it is apparent that the granting of a license by the Commissioner to an out of state dealer, which will further the efforts of that dealer to take additional milk supplies out of the state to supply markets in other states, would be contrary to Sections 258-c and 258-k of Article 21 of the Agriculture and Markets Law.

Mr. Titus: I object to that statement as an assumption of law.

Mr. Lalor (cont'g): The shortage of milk and cream in the New York area to Buffalo is common knowledge, and I do not feel that any proof of the existence of such shortage is required at this hearing. However, I should like to point out that at a meeting of the Schenectady Dairy Council on March 21, at least five Schenectady milk dealers reported that they were unable to obtain sufficient milk for their needs.

Mr. Titus: I move to strike that out. It is not the best proof.

[fol. 106] Mr. Lamont: The Solicitor General of the State of New York, in discussing the admissibility of evidence in administrative hearings, recently quoted the Supreme Court of the United States on the subject of the quality of evidence which should be acceptable at hearings of this sort, and it is his opinion, as stated, that in a hearing of this sort we accept evidence upon which businessmen are accustomed to rely in the business which is being regulated by the tribunal holding the hearing.

I suggest that this evidence is within the scope of that limitation and should be admitted.

Mr. Titus: I am acquainted with that since a good friend of mine wrote it, and it is always within the power of the Hearing Commissioner to accept or reject any testimony

FINANCIAL STATEMENT OF ASSETS AND LIABILITIES OF APPLICANT

184—

(Date here)

ASSETS

LIABILITIES

Cash on hand	See Schedule Attached	Value of land and other assets purchased on credit not paid for (as per Schedule A)	
Cash in bank		Other accounts due or past due (as per Schedule A)	
Accounts owing by customers, good and collectible, not pledged or sold (as per Schedule A)		Other accounts not due (as per Schedule A)	
Notes owing by customers, good and collectible, not pledged or sold (as per Schedule B)		Notes payable for Mdse. (as per Schedule B)	
Merchandise: (not on consignment or conditional sale). How valued: Cost		For BORROWED MONEY: Notes payable to banks (as per Schedule B)	
Market		Notes or debts payable to others (including relatives and friends) (as per Schedule B)	
Other quick assets: (Describe)		Owing for Wages and Salaries	
		Owing for Taxes (city, state and federal)	
		Owing for Rental	
		Owing for Insurance Premiums	
TOTAL QUICK ASSETS		TOTAL QUICK LIABILITIES	
Machinery: (Cost \$	XXXXXX	Debt secured by mortgage on land or buildings (as per Schedule C)	
Depreciated (Deduct)		Debt secured by chattel mortgage or other loans	
Furniture and other Equipment	XXXXXX	Debt secured by judgment	
(Cost \$	XXXXXX	Other liabilities: (Describe)	
Depreciated \$			
Land and Buildings (as per Schedule C)		TOTAL LIABILITIES	
Notes and Accounts owing from Officers, employees, or others not customers		Capital Stock: Preferred	
Other assets (Describe)		Common	
		NET WORTH	
		Surplus and Undivided Profits	
TOTAL ASSETS		TOTAL	

SCHEDULE A

State nature of accounts, how long outstanding, and if disputed, or overdue, explain.

ACCOUNTS RECEIVABLE

ACCOUNTS PAYABLE

TOTAL ASSETS

TOTAL

SCHEDULE A

State nature of accounts, how long outstanding, and if disputed, or overdue, explain.

ACCOUNTS RECEIVABLE

ACCOUNTS PAYABLE

TOTAL			TOTAL		

SCHEDULE B

Give full particulars as to nature of notes, and if disputed, or overdue, explain.

NOTES RECEIVABLE

NOTES PAYABLE

TOTAL			TOTAL		

SCHEDULE C: REAL ESTATE—If recorded other than in name of Applicant, state relationship to Applicant.

Description and location	Recorded in name of	Value	Amount of Exemptions
		TOTAL	

20 Insurance on merchandise \$

On buildings \$

21. Net profit last fiscal year \$

Net loss last fiscal year \$

22 Is the financial condition of the applicant, at the date of making this application, as good as indicated by the detailed financial statement above? Yes

23. As of date of this application, the applicant ^{own} worth the net sum of \$11,400.00

which he sees fit, and it is always within my power to reject or accept.

Mr. Lamont: And it is always within the power of the parties having a pecuniary interest to give their version.

The Chair: We would appreciate it very much, Mr. Lalor, if you would stick to facts that you know of your own knowledge. While the Commissioner is not bound by technical rules of evidence, we do not want to get too far afield. Then the applicant may have to come back and present further facts.

We will leave it in the record.

[fol.107] Mr. Lalor (cont'g): I should like to recall the fact that under the provisions of Section 258-m of Article 21, a Milk Marketing Order has been promulgated for the Capitol District. The evidence upon which this order was based—

Mr. Titus: I object to any evidence on which any order promulgated by any agency was based as not being within the knowledge of the witness.

The Chair: I think that is objectionable. I will sustain the objection.

Mr. Lalor: O. P. A. price ceilings established for this area have made it impossible for handlers in the Capitol District to protect themselves.

Mr. Titus: I move to strike out that statement as a conclusion of the witness. It is argumentative and a matter for argument and not of testimony.

The Chair: I will have to sustain the objection.

Mr. Lalor: I will say, Mr. Clough, that this statement is quite general. I think I can make some additions to what I have already said.

I would like to point out one thing—that the Hood Company at the present time has under consideration, or the Secretary of Agriculture, a proposal for an amendment to the Boston Milk Marketing Order.

Mr. Titus: I object to that as not being within the knowledge of the witness.

Mr. Lalor: That is within my knowledge, and I testified at the hearing in Boston.

[fol.108] Mr. Titus: Then qualify yourself. Let us hear the statement when it was.

Mr. Lalor: This was at a Federal Milk Order hearing in Boston, which was held between February 4 and February 16.

24. The maximum amount of milk received, purchased, handled or sold in any calendar month since April 1, 1944 (exclusive of the amount used by the applicant for manufacturing milk products other than cream, condensed or concentrated milk not packed in hermetically sealed cans, and exclusive of milk received outside of the State of New York and not distributed or sold within the State of New York) was received during the month of June

25. The following is a detailed statement of all milk, cream and condensed milk received, purchased, handled or sold during the month just mentioned:

- (a) Fluid milk received from producers and Cooperative Association _____ lbs
(b) Fluid milk of own production _____ lbs
(c) Fluid milk received from dealers (including receipts for processing) _____ lbs
(d) Fluid milk purchased or sold (but not physically handled) _____ lbs
(e) Cream from producers _____ lbs Average fat _____ % Milk Equiv _____ lbs
(f) Cream from dealers _____ lbs Average fat _____ % Milk Equiv _____ lbs
(g) Condensed from dealers _____ lbs Average fat _____ % Milk Equiv _____ lbs
(h) Total received (in terms of milk) _____ lbs
(i) Milk utilized for manufactured products other than cream, condensed or concentrated milk except when sold in hermetically sealed cans _____
(j) Milk received outside the State of New York and not delivered or sold in the State _____
(k) Total of the two foregoing items _____
(l) Difference [item (h) less item (i)] 3,939,069
(m) Average daily amount of item (l) 108,376

26. There is presented herewith a license fee in the sum of \$1,500.00 ☒ Check No. _____
\$140.00 ☐ Money Order No. 7/23/46
\$1640.00 ☐ Cash

(NOTE: All license fees must be in the form of check or money order made payable to the Department of Agriculture and Markets)

27. Do you agree not to buy milk or cream from or sell milk or cream to any milk dealer who has failed to obtain a Milk Dealer's License as required by Article 21 of the Agriculture and Markets Law? Yes

28. Did you comply with the law and all rules and orders of the Commissioner of Agriculture and Markets? Yes
Have you filed monthly reports when due as required by Official Order? Yes

29. Do you agree to comply with the law and all rules and orders of the Commissioner of Agriculture and Markets? Yes

30. The applicant hereby represents that the statements made in this application and in the schedules accompanying it, which schedules are hereby made a part of this application, are true and correct.

Dated at Boston, Massachusetts this 19th day of February, 1946

NOTE: If corporation, firm name must be signed and each member must sign individually as well. If corporation, corporate name must be signed in full with the officer's name and title on line below. CORPORATE SEAL MUST BE IMPRESSED.

H. P. Hood & Sons, Inc.
(Name of Applicant Sign on line above)
By [Signature]
Vice President and Treasurer

Execution of this application must always be acknowledged before a notary public or other officer authorized to take acknowledgments. The name of the individual must appear in the acknowledgment.

INDIVIDUAL OR PARTNERSHIP ACKNOWLEDGMENT

STATE OF NEW YORK

Dated at Boston, Massachusetts this 19th day of February, 1946

NOTE: If corporation, firm name must be signed and each member must sign individually as well. If corporation, corporate name must be signed in full with the officer's name and title on line below. CORPORATE SEAL MUST BE IMPRESSED.

H. P. Hood & Sons, Inc.
(Name of Applicant Sign on line above)
By [Signature]
Vice President and Treasurer

Execution of this application must always be acknowledged before a notary public or other officer authorized to take acknowledgments. The name of the individual must appear in the acknowledgment.

INDIVIDUAL OR PARTNERSHIP ACKNOWLEDGMENT

STATE OF NEW YORK

County of _____

On this _____ day of _____, 1946, before me personally appeared _____ the above named individual to me personally known and known to me to be the same individual described in and who executed the foregoing instrument and duly acknowledged to me that he executed the same, and he further by me being duly sworn said, each for himself, that he had read the foregoing application and that the same is true in every respect.

Notary Public

Commonwealth of Massachusetts
STATE OF NEW YORK

County of Suffolk

On this 19th day of February, 1946, before me personally came Gilbert H. Hood, Jr. to me known, who by me being duly sworn, did say that he resides in Winchester, Massachusetts that he is the Vice President and Treasurer of the H. P. Hood & Sons, Inc. the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal, that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order, and he further by me being duly sworn deposes and says that he has read the foregoing application and that the same is true in every respect.

[Signature]
Notary Public

Mr. Titus: Who were you representing there?

Mr. Lalor: I was representing the General Ice Cream Corporation. This proposition, if approved, will further enable the Hood Company to compete with New York handlers.

Mr. Titus: I move to strike out that as a conclusion of the witness—as a matter of argument and not of testimony.

The Chair: I think it is rather remote to expect that the Commissioner would take into consideration some proposal which has been proposed but has not yet been acted upon and may not be.

Mr. Lalor: This may or may not be important. We are only trying to give the Commissioner all the facts that we can get on this thing.

Mr. Titus: It may or may not be approved, and this record has to stand on its legs as of today.

The Chair: If we were to take that into consideration we might have to wait and see how the secretary acted upon it. We cannot do that.

I will sustain the objection.

Mr. Lalor: I am afraid that is all the testimony that I have, Mr. Clough.

Mr. Titus: No questions.

Mr. French: No questions.

[fol. 109] The Chair: Is there anything else?

Mr. Titus: I have one statement that I want to make.

If the fact that different regulations between Massachusetts and New York are to be considered by the Commissioner in his determination, I must request that we be allowed at some future date—if that is determined—to put in proof on that score. I do not wish to take up the time of the hearing now, since the Hearing Commissioner here has stated that it was not a subject for consideration by the Hearing Commissioner, but I did understand that some of that testimony was left in the record for the Commissioner to decide whether or not it was material. I do not want to be precluded from putting in evidence, but I also do not want to prolong the hearing.

The Chair: Let us have it understood that if the Commissioner decides that the matter of any difference in the health regulations of the City of New York or any other municipality within the State of New York and those of

Boston is an issue, you will be given a further opportunity to present evidence.

Mr. Titus: That is perfectly satisfactory.

Mr. Strang: I would like to say that the Washington and Rensselaer Counties Co-operative Association, Inc., and Gold Medals Farms are opposed to the extension of this license.

The Chair: Hearing closed and decision reserved.

[fol. 110]

EXHIBIT 1

STATE OF NEW YORK, DEPARTMENT OF AGRICULTURE AND
MARKETS, DIVISION OF MILK CONTROL

To: H. P. Hood & Sons, Inc., 500 Rutherford Ave., Boston, Massachusetts.

Please take notice that you are hereby directed to show cause at a hearing to be held before the Commissioner of Agriculture and Markets of the State of New York, or a person or persons designated by him at the offices of the Division of Milk Control on the twentieth floor of the State Office Building in the City of Albany, New York on the twenty-fifth day of March, 1946 at two o'clock in the afternoon of that day, or as soon thereafter as the matter can be reached, why an extension of Milk Dealer's License No. 51 heretofore issued to you for the license period ending March 31, 1946 should be granted, pursuant to the provisions of Article 21 of the Agriculture and Markets Law, to permit you to recondition and equip a milk receiving station at Greenwich, N. Y. for the purpose of purchasing and receiving milk from producers.

Take notice that at said hearing you will be afforded an opportunity to produce witnesses on your own behalf and examine witnesses, if any, produced by and for the Commissioner of Agriculture and Markets of the State of New York and to appear by Attorney, if you so desire. You are directed to produce at said hearing any and all books, statements, papers, records, documents and other evidence relevant to the above described matter. It will be impossible to grant an adjournment except

H. P. HOOD & SONS, INC.

BALANCE SHEET, FEBRUARY 29, 1944

ASSETS

Cash	\$ 802,122.46
Accounts and Notes Receivable, Customers	2,093,113.94
Accounts and Notes Receivable, Others	312,435.95
Merchandise and Supplies	2,283,404.41
Securities	6,671,773.02
Real Estate, less reserves	3,934,131.53
Machinery and Equipment, etc., less reserves	3,491,614.98
Delivery Equipment, less reserves	663,849.71
Prepaid Insurance and Taxes	80,232.33
Goodwill	1.00
Other Prepaid Expenses	536,532.33

Total \$20,871,211.96

LIABILITIES

Accounts Payable	\$ 5,435,153.89
7% Income Debentures	3,500,000.00
Reserve for Contingencies	275,000.00
Preferred Stock 7% cumulative, par \$100	1,296,400.00
Common Stock, no par value	7,543,594.12
Surplus	2,841,063.95

LIABILITIES

Accounts Payable	\$ 5,435,153.89
7% Income Debentures	3,500,000.00
Reserve for Contingencies	275,000.00
Preferred Stock 7% cumulative, par \$100	1,296,400.00
Common Stock, no par value	7,543,594.12
Surplus	2,841,063.95

Total \$20,871,211.96

RECEIVED
DEPT. AGRIC. & MARKETS

FEB 23 1945

DIVISION OF
MILK CONTROL

for extraordinary circumstances and in case of your failure to appear and answer, a determination will be made by default.

C. Chester DuMond, Commissioner of Agriculture and Markets of the State of New York. By Kenneth F. Fee, Director of Milk Control.

Dated and sealed at the City of Albany, New York this 13th day of March 1946. (Seal)

[fol. 112]

EXHIBIT 2

Application for Renewal of Petitioner's License.

APPLICATION FOR RENEWAL OF MILK DEALER'S LICENSE

TO BE FILED BY MARCH 1, 1945

(Article 21 of the Agriculture and Markets Law)
(Chapter 126 of the Laws of 1934 as amended)

To the Commissioner of Agriculture and Markets,
Albany, N. Y.

The undersigned hereby applies for a license to purchase, handle, sell or distribute milk, pursuant to the provisions of Article 21 of the Agriculture and Markets Law, for the period ending March 31, 1945, and in support of such application makes the following statements and answers to questions:

1. Print correctly your name and business address below:

800 Rutherford Ave.
Kptol, Massachusetts

RECEIVED
DEPT. OF AGRICULTURE
FEB 27 1945
LAW OFFICE

2. (a) Do you hold an unrevoked milk dealer's license under Article 21 for the license year April 1, 1944 March 31, 1945 Yes
(b) If so, give number 50 (c) If you have, during the past year, succeeded a licensed milk dealer in business state date, name and address of such dealer _____
(d) Trade name of applicant _____

3 (a)
If applicant is
an individual

Full name _____ Age _____
Residence address _____
(Street and number, city and state)

3 (b)
If applicant is
a partnership

FULL NAMES OF ALL PARTNERS	RESIDENCE ADDRESS (Street and number, city and state)	AGE

3 (c)
If applicant is
a corporation

In what state incorporated Massachusetts Date incorporated February 2, 1920
Principal office 800 Rutherford Avenue, Boston 20, Massachusetts
If a foreign corporation are you qualified to do business in the State of New York? Yes If so, when? February 2, 1920
Give name and address of person resident of this state upon whom service of process may be made Mr. G. L. Gould, Eagle Bridge, New York
Authorized capital \$ 10,000,000 Preferred Capital paid in cash \$ 7,733,000.00 Preferred

3 (c)
If applicant is
a corporation

If a foreign corporation are you qualified to do business in the State of New York? Yes If so, when? February 2, 1920
Give name and address of person resident of this state upon whom service of process may be made Mr. G. L. Gould, Eagle Bridge, New York
Authorized capital \$ 10,000,000 Preferred Capital paid in cash \$ 7,733,000.00 Preferred

FULL NAME OF	RESIDENCE ADDRESS (Street and number, city and state)	DATE OF TAKING OFFICE
President <u>J. P. Hood</u>	<u>2 Larchwood Drive, Cambridge</u>	<u>May 3, 1944</u>
Vice President <u>Gilbert H. Hood, Jr.</u>	<u>6 Everett Ave., Winchester</u>	<u>May 3, 1944</u>
Secretary <u>Foland H. Boutwell 2nd</u>	<u>20 Foxcroft Rd., "</u>	<u>May 3, 1944</u>
Treasurer <u>Gilbert H. Hood, Jr.</u>	<u>6 Everett Ave., "</u>	<u>May 3, 1944</u>
Directors <u>The above and</u>		
<u>Harold M. Lewis</u>	<u>131 Mystic Street, West Melford</u>	<u>May 3, 1944</u>

4. How many milk cows do you keep? NONE No milked now? _____ Qts produced daily _____
5. Do you purchase milk or cream from (a) milk producers? Yes If so, how many? 750
(b) any cooperative association? Yes (c) any other dealer? Yes
6. The maximum amount paid by applicant to producers, a Cooperative Association or the individual producer members of a Cooperative Association for milk and/or cream purchased during any one month during the year immediately prior to making this application was \$ 275,000.00 and was paid during the month of June 1944
7. State amount of surety bond or securities in lieu thereof filed with the Department for the license years ending March 31, 1945 \$ 40,000.00 March 31, 1946 \$ 40,000.00
8. Give details with reference to payments made by you for milk received or purchased.
On what days are payments regularly made? 3rd and 1st Show period covered by payment 1-15th and 1-31st.
Are any payments for milk now past due? No If so, state amount and reasons _____
9. The maximum value of the milk and/or cream expected to be purchased by applicant from producers, a Cooperative Association or the individual producer members of a Cooperative Association in any one month during the license year ending March 31, 1946 is estimated at \$ 275,000.00 and it is believed that such maximum will be purchased during the month of June 1945

NAME BY WHICH PLANT IS KNOWN	POST OFFICE ADDRESS OF PLANT	COUNTY	NAME OF PLANT MANAGER
P. 1001	Long, Int. Knole Bridge, N. Y.	Netherlands	F. A. Dunham
P. 1002	Long, Int. Salem, New York	Washington	E. A. Stearns
P. 1003	Long, Int. Norfolk, New York	St. Lawrence	G. Wilson

NAME	ADDRESS	COMMODITY PURCHASED	APPROX DAILY AMOUNT	PRICE PAID

[illegible][illegible][illegible]

113a

[fol. 114]

EXHIBIT 3

License No. 51

STATE OF NEW YORK, DEPARTMENT OF AGRICULTURE AND MARKETS,
DIVISION OF MILK CONTROL

1945 [Seal] 1946

Pursuant to the provisions of Article 21 of the Agriculture and Markets Law (Chapter 126 of the Laws as 1934, as amended), H. P. Hood & Sons, Inc. (Name of Licensee), of 500 Rutherford Ave., Boston, Mass. (Address), hereinafter referred to as the licensee is, unless otherwise restricted, conditioned, or limited below, hereby licensed to purchase milk or cream from other licensed milk dealers, exclusive of cooperative associations. In case the licensee has filed a surety bond or has been relieved from so doing by the undersigned Commissioner, the licensee is, unless otherwise restricted, conditioned, or limited below, hereby licensed to purchase milk or cream from producers at the plant or plants named in the licensee's application only, and from cooperative associations licensed pursuant to Article 21 of the Agriculture and Markets Law. The licensee is, unless otherwise restricted, conditioned, or limited below, licensed to deal in, handle, distribute, or sell, in accordance with the intent indicated in the licensee's application, milk or cream, or both, in the place or places specifically named therein, and in no other place or places, and then only on the route or number of routes of the character (wholesale or retail) indicated therein. No milk or cream shall be purchased from or sold to a dealer required to be licensed unless such dealer be duly licensed.

This license is valid until March 31, 1946, unless sooner revoked.

C. Chester DuMond, Commissioner of Agriculture and Markets. By ———, Director, Division of Milk Control.

Dated at Albany, N. Y. April 1, 1945.

\$1,505.00 fee paid for license.

140.00 2/23/46

1,645.00

This License Cannot Be Sold or Transferred.

[fol. 116]

EXHIBIT 4

H. P. Hood & Sons

Dairy Products

500 Rutherford Avenue, Boston 29, Mass.

Executive Offices

January 30, 1946.

Mr. J. A. Conboy, Supervisor of Licensing, Division of Milk Control, Department of Agriculture and Markets, Albany 1, New York.

DEAR MR. CONBOY:

We have an option to purchase certain property in Greenwich, New York formerly operated as the Greenwich and Easton Farm Products Company. We wish to take the machinery, now at Eagle Bridge, for receiving milk to Greenwich and install it to make a complete receiving station, buying milk direct from producers. Many of our routes into Eagle Bridge and Salem are too long, and it is very difficult for us to get the milk in and dumped by nine o'clock. We expect to take about 200 cans of milk off of Eagle Bridge and 100 cans off of Salem and turn it into the plant at Greenwich as a better means of serving producers.

We hereby request License blank suitable for what we wish to do, and in compliance with your Orders and Regulations. On receipt of same we will submit you an application for a License together with whatever necessary data and [fol. 117] fees you require. May we hear from you at your earliest convenience?

Very truly yours, Don N. Geyer, General Manager,
Country Division.

DNG/O.

P.S. The new Eagle Bridge plant is equipped throughout with new machinery and will start operating April 1. DNG.

[fol. 118]

EXHIBIT 5

Application for Renewal of Milk Dealer's License for 1947.

389 FEB 15 46

APPLICATION FOR RENEWAL OF MILK DEALER'S LICENSE TO BE FILED BY MARCH 1, 1946

(Article 21 of the Agriculture and Markets Law)
(Chapter 126 of the Laws of 1934 as amended)

To the Commissioner of Agriculture and Markets,
Albany, N. Y.

The undersigned hereby applies for a license to purchase, handle, sell or distribute milk, pursuant to the provisions of Article 21 of the Agriculture and Markets Law for the period ending March 31, 1947, and in support of such application makes the following statements and answers to questions:

1. Print correctly your name and business address below

P. HOOD & SONS, INC.
500 Rutherford Ave.
Boston, Massachusetts
Mass

DEPT. OF AGRICULTURE
FEB 15 1946
MILK DEPARTMENT
LEAVE THIS SPACE BLANK

2. (a) Do you hold an unexpired milk dealer's license under Article 21 for the license year April 1, 1945—March 31, 1946? Yes
(b) If so, give number 51 (c) If you have, during the past year, succeeded a licensed milk dealer in business state date, name and address of such dealer _____
(d) Trade name of applicant _____

3 (a). If applicant is an individual
Full name _____ Age _____
Residence address _____
(Street and number, city and state)

3 (b). If applicant is a partnership
FULL NAMES OF ALL PARTNERS _____ RESIDENCE ADDRESS _____ AGE _____
(Street and number, city and state)

3 (c). If applicant is a corporation
In what state incorporated Massachusetts Date incorporated February 2, 1920
Principal office 500 Rutherford Avenue, Boston 29, Mass.
If a foreign corporation are you qualified to do business in the State of New York? Yes If so, when? February 2, 1920
Give name and address of person resident of this state upon whom service of process may be made Mr. George L. Gould, Eagle Bridge, New York
Common No. 10 6,449,228-19

3 (c). If applicant is a corporation
Principal office 500 Rutherford Avenue, Boston 29, Mass.
If a foreign corporation are you qualified to do business in the State of New York? Yes If so, when? February 2, 1920
Give name and address of person resident of this state upon whom service of process may be made Mr. George L. Gould, Eagle Bridge, New York
Common No. 10 6,449,228-19
Authorized capital \$10,000,000 Preferred _____ Capital paid in cash \$7,733,600.00 Preferred _____

FULL NAME OF	RESIDENCE ADDRESS (Street and number, city and state)	DATE OF TAKING OATH
President <u>J. P. Hood</u>	<u>2 Larchwood Drive, Cambridge</u>	<u>May 2, 1945</u>
Vice President <u>G. E. Hood, Jr.</u>	<u>6 Everett Ave., Winchester</u>	" " "
Secretary <u>Roland d. Boutwell, 2nd</u>	<u>20 Foxcroft Rd.</u>	" " "
Treasurer <u>G. E. Hood, Jr.</u>	<u>6 Everett Ave.,</u>	" " "
Directors <u>The above and</u> <u>Harold K. Lewis</u>	<u>131 Mystic St. West Medford</u>	" " "

4. How many milk cows do you keep? None No. milked now? _____ Qts. produced daily _____
5. Do you purchase milk or cream from (a) milk producers? Yes If so, how many? 729
(b) any cooperative association? No (c) any other dealer? No
6. The maximum amount paid by applicant to producers, a Cooperative Association or the individual producer members of a Cooperative Association for milk and/or cream purchased during any one month during the year immediately prior to making this application was \$300,000.00 and was paid during the month of June 1945
7. The maximum value of the milk and/or cream expected to be purchased by applicant from producers, a Cooperative Association or the individual producer members of a Cooperative Association in any one month during the license year ending March 31, 1947 is estimated at \$300,000.00 and it is believed that such maximum will be purchased during the month of June 1946
8. Give details with reference to payments made by you for milk received or purchased.
On what days are payments regularly made? 3rd and 15th Show period covered by payment 1-15th and 16-31st.
Are any payments for milk now past due? No If so, state amount and reasons _____
9. State amount of surety bond or securities in lieu thereof filed with the Department for the license years ending:
March 31, 1946 \$40,000.00 March 31, 1947 \$

11. List below each plant or station in New York State owned or operated by you where you receive milk or cream from producers or individual members of cooperative associations.

NAME OF PLANT	POST OFFICE ADDRESS OF PLANT	COUNTY	NAME OF PLANT MANAGER
E. P. Hunt & Sons, Inc.	Eagle Bridge, N. Y.	Rensselaer	F. A. Dunham
	Norfolk, N. Y.	St. Lawrence	O. Wilson
	Salem, N. Y.	Washington	E. A. Stearns

12. Give below the name of each milk dealer or cooperative association from whom you are purchasing milk or cream.

NAME	ADDRESS	COMMODITY PURCHASED	APPROX. DAILY AMOUNT	PRICE PAID

13. Give below details regarding each health permit which you hold.

Type of Permit	Name of Health Officer Issuing Each Permit	Nature of Permit from Health Officer (State if Wholesale or Retail or if limited in any way)	Date Permit Expires (Give exact information)		
			Mo.	Day	Year

14. List below each city, village, and hamlet in which you sell milk or cream. Dealers in New York City give Borough or District in which you serve. If you serve places other than the cities, villages, and hamlets listed below, attach a list of such other places with each such area specifically and furnish information similar to that required below for each such area. Do not include any place not served every community therein.

NAME OF PLACE SERVED	Length of Time You Have Served Each Place		Give Nature of Operations in Each Place. Answer "Yes" or "No"				Approximate No. Quarts of Milk Sold Daily at Each Place Named
	Years	Months	Deliver to Retail Customers	Deliver to Wholesale Customers	Sell to Other Dealers	Sell at Farm or at Plant	
None in New York State.							

15. Do you agree not to sell milk or cream in any place or places other than those named in answer to question 13 above, unless hereafter authorized in writing by the Commissioner to sell in other places? Yes

16. Give nature of business transacted. Do you sell pasteurized milk? No raw milk? No

Do you utilize milk or cream for manufacture? Yes Do you operate a pasteurizing plant? No

Do you process milk for others? No

Do you sell milk and/or cream to other licensed dealers? No If so, how many? _____

If operating in New York City, to how many Class I dealers do you sell milk? _____

17. How many delivery routes do you operate? NONE Describe them below

- (a) _____ Routes serving house customers (retail)
 (b) _____ Routes serving stores, restaurants, hotels or institutions (wholesale)
 (c) _____ Routes where both retail and wholesale trade are served
 (d) _____ Routes supplying other licensed dealers only

_____ Total number routes operated

If applicant operates more than one city plant, attach supplement, giving name and address of each plant or branch and details as to business transacted at each.

18. Are you surety or endorser upon any bond, note, or other obligation not included in following statement of liabilities?

If so, give names and amounts. No

19. Has judgment been entered against you, upon which execution has been returned unsatisfied?

If so, state when, what court and nature of judgment. No

20. Is any suit, action or proceeding pending against you, which relates directly or indirectly to any purchase of milk or cream? No If so, state plaintiff's name and residence and the nature of such action or proceeding and the full title thereof.

FINANCIAL STATEMENT OF ASSETS AND LIABILITIES OF APPLICANT

as of _____ 194_____
(Date here)

ASSETS

LIABILITIES

Cash on hand and in Bank See Schedule Attached

Accounts owing by customers, good and collectible, not pledged or sold (as per Schedule A)

Notes owing by customers, good and collectible, not pledged or sold (as per Schedule B)

Merchandise (not on consignment or consignment) How valued?

At _____ or Market _____

Other quick assets (Describe) _____

TOTAL QUICK ASSETS

Machinery: (Cost \$ _____)

Depreciated (Deduct) _____

Tractors and other Equipment:

(Cost \$ _____)

Depreciated \$ _____

Land and Buildings (as per Schedule C)

Automobiles & Trucks _____

Notes and Accounts owing from Officers, employees, or others not customers

Livestock _____

Other assets (Describe) _____

TOTAL ASSETS

Value of Milk and Cream purchased but not paid for (as per Schedule A)

Other accounts due or past due (as per Schedule A)

Other accounts not due (as per Schedule A)

Notes payable for Milk (as per Schedule B)

For BORROWED MONEY Notes payable to banks (as per Schedule B)

Notes or debts payable to others (including relatives and friends) (as per Schedule B)

Owing for Wages and Salaries _____

Owing for Taxes (city, state and federal) _____

Owing for Rental _____

Owing for Insurance Premiums _____

TOTAL QUICK LIABILITIES

Debt secured by mortgage on land or buildings (as per Schedule C)

Debt secured by chattel mortgage or other liens _____

Debt secured by judgment _____

Other liabilities: (Describe) _____

TOTAL LIABILITIES

Capital Stock Preferred _____
Common _____

Surplus & Undivided Profits _____

TOTAL LIABILITIES & NET WORTH

SCHEDULE A

State nature of accounts, how long outstanding, and if disputed, or overdue, explain.

ACCOUNTS RECEIVABLE

ACCOUNTS PAYABLE

SCHEDULE A

State nature of accounts, how long outstanding, and if disputed, or overdue, explain.

ACCOUNTS RECEIVABLE

ACCOUNTS PAYABLE

TOTAL

TOTAL

SCHEDULE B

Give full particulars as to nature of notes, and if disputed, or overdue, explain.

NOTES RECEIVABLE

NOTES PAYABLE

TOTAL

TOTAL

SCHEDULE C: REAL ESTATE—If recorded other than in name of Applicant, state relationship to

Description and location

Recorded in name of

Value

TOTALS

20. Insurance on merchandise \$ _____ On buildings \$ _____

21. Net profit last fiscal year \$ _____ Net loss last fiscal year \$ _____

22. Is the financial condition of the applicant, at the date of making this application, as good as indicated by the statement above? Yes

23. As of date of this application, the applicant is worth the net sum of \$ 11,376,000.00

24. The maximum amount of milk received, purchased, handled or sold in any calendar month since April 1, 1945 (exclusive of the amount of milk received, purchased, handled or sold in any calendar month prior to April 1, 1945) was received during the month of JUNE 1945

25. The following is a detailed statement of all milk, cream and condensed milk received, purchased, handled or sold during the month just mentioned:

(a) Fluid milk received from producers	3,722,754	lbs
(b) Fluid milk of own production		lbs
(c) Fluid milk received from dealers (including receipts for processing)		lbs
(d) Fluid milk purchased or sold (but not physically handled)		lbs
(e) Cream from producers		lbs
(f) Cream from dealers		lbs
(g) Condensed from dealers		lbs
(h) Total received (in terms of milk)	3,722,754	lbs
(i) Milk utilized for manufactured products other than cream, condensed or concentrated milk except when sold in hermetically sealed cans		
(j) Milk received outside the State of New York and not delivered or sold in the State		
(k) Total of the two foregoing items		
(l) Difference [Item (h) less Item (k)]	9,722,754	
(m) Average daily amount of Item (l)	324,042	

26. There is presented herewith a license fee in the sum of \$1,000.00 ☒ Check No. _____
☐ Money Order No. _____
☐ Cash

(NOTE: All license fees must be in the form of check or money order made payable to the Department of Agriculture and Markets.)

27. Do you agree not to buy milk or cream from or sell milk or cream to any milk dealer who has failed to obtain a Milk Dealer's License as required by Article 21 of the Agriculture and Markets Law? Yes

28. Did you comply with the law and all rules and orders of the Commissioner of Agriculture and Markets? Yes
Have you filed monthly reports when due as required by Official Order? Yes

29. Do you agree to comply with the law and all rules and orders of the Commissioner of Agriculture and Markets? Yes

30. The applicant hereby represents that the statements made in this application and in the schedules accompanying it, which schedules are hereby made a part of this application, are true and correct.



Dated at Boston, Mass.
this 11th
February 1946

H. E. Hood & Sons, Inc.
(Name of Applicant - Sign on Above Line)



Dated at Boston, Mass.
this 11th
February 1946

H. E. Hood & Sons, Inc.
(Name of Applicant - Sign on Above Line)

By

Title

Vice President & Treasurer

NOTE: If corporation, a power must be signed and one member must sign individually as well as corporation, corporate name must be stated in full and title on line below.

Execution of this application must always be acknowledged before a notary public or other officer authorized to take acknowledgments. The name of the individual must appear in the acknowledgment.

INDIVIDUAL OR PARTNERSHIP ACKNOWLEDGMENT

STATE OF NEW YORK

County of _____

On this _____ day of _____, 1946, before me personally appeared _____ the above named individual to me personally known and known to me to be the same individual described in and who executed the foregoing instrument and duly acknowledged to me that he executed the same, and he further by me being duly sworn said, each for himself, that he had read the foregoing application and that the same is true in every respect.

Notary Public

Commonwealth of Massachusetts CORPORATE ACKNOWLEDGMENT

County of Suffolk

City of Boston

On the 11th day of February, 1946, before me personally appeared H. E. Hood, Jr. to me known, who by me being duly sworn, did say that he is the Vice President and Treasurer of the H. E. Hood & Sons, Inc. the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name therein by like order; and he further by me being duly sworn deposes and says that he has read the foregoing application and that the same is true in every respect.

Reginald Umbach
Notary Public

L. J. ROSS & SONS, INC.

BALANCE SHEET. DECEMBER 31, 1942

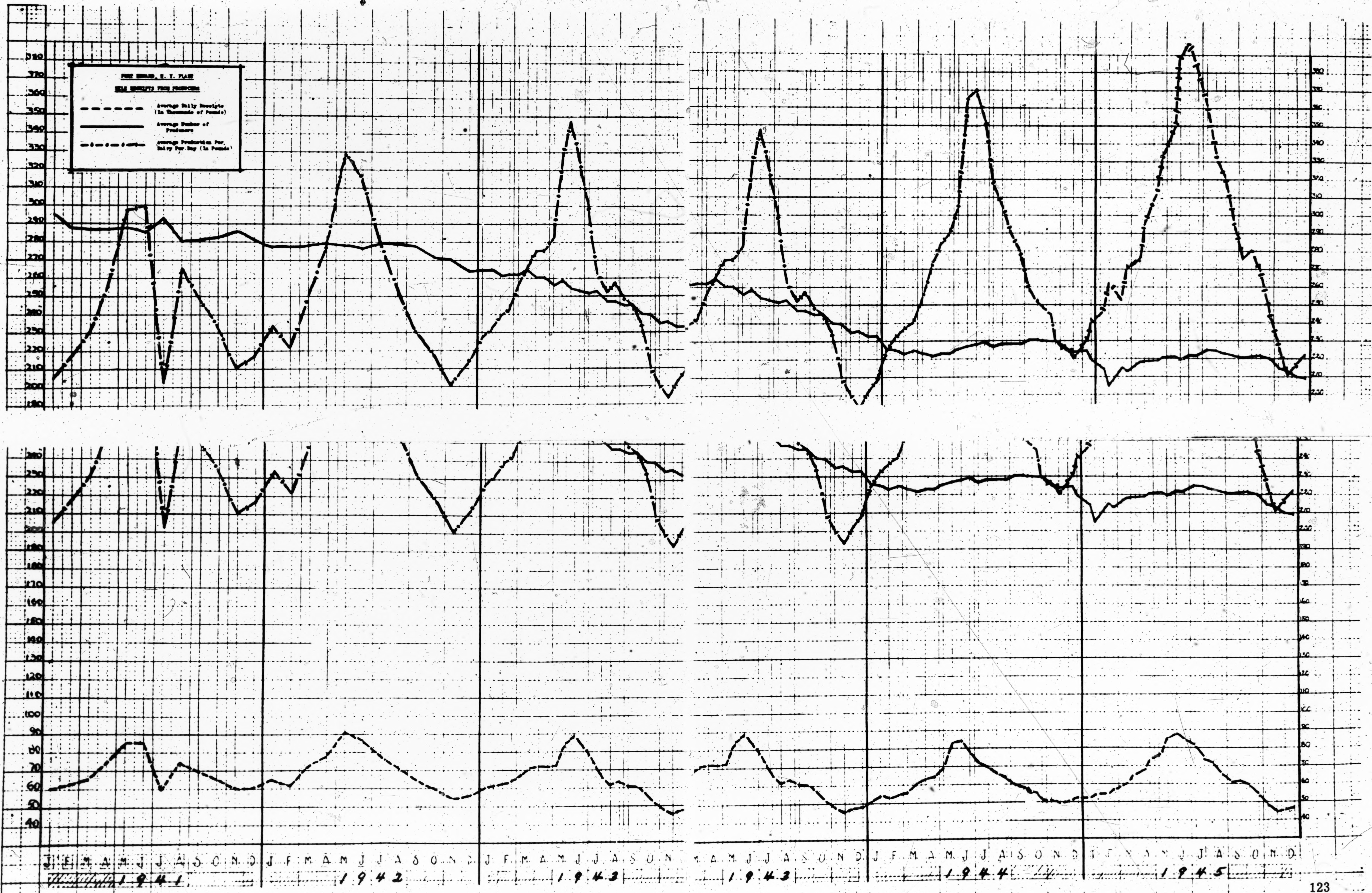
ASSETS

Cash	1,442,422.47
Accounts and Notes Receivable, Customers	2,004,122.40
Accounts and Notes Receivable, Others	720,122.40
Merchandise and Supplies	2,442,422.40
Securities	1,442,422.40
Real Estate, less Reserves	1,114,422.40
Machinery and Equipment, etc., less reserves	3,012,422.40
Delivery Equipment, less reserves	712,422.40
Prepaid Insurance and Taxes	124,422.40
Goodwill	1.00
Other Prepaid Expenses	520,422.40
	<hr/>
Total	\$22,539,822.40
	<hr/>

Delivery Equipment, less reserves	712,422.40
Prepaid Insurance and Taxes	124,422.40
Goodwill	1.00
Other Prepaid Expenses	520,422.40
	<hr/>
Total	\$22,539,822.40
	<hr/>

LIABILITIES

Accounts Payable	2,772,422.40
7% Income Retentions	1,772,422.40
Reserve for Contingencies	124,422.40
Preferred Stock \$5 cumulative, par \$100	7,772,422.40
Common Stock, no par value	3,000,000.00
Surplus	64,422.40
	<hr/>
Total	\$22,539,822.40
	<hr/>



[fols. 120-121]

EXHIBIT 6A

Middletown Milk & Cream Co., Inc.

Number of Producers Delivering Milk to Fort Edward,
N. Y. Plant January, 1941 to March, 1946

Month	1941	1942	1943	1944	1945	1946
January	295	277	265	226	210	209
February	288	277	262	224	214	212
March	287	277	264	223	218	214
April	288	279	260	223	220	
May	288	278	258	227	220	
June	286	276	254	229	222	
July	293	278	253	228	225	
August	280	278	247	228	223	
September	281	277	245	230	222	
October	282	272	240	229	221	
November	286	270	236	223	214	
December	281	264	233	222	210	

Average Daily Milk Receipts (in Pounds)—Fort Edward,
N. Y. Plant

Years 1941 to 1945

	High	Low
1941	85,696	59,205
1942	91,499	54,285
1943	88,276	45,740
1944	84,273	49,386
1945	88,193	44,960

[fol. 122]

EXHIBIT 6B

Chart.

(Here follows 1 photolithograph, side folio 123)

[fol. 124] IN SUPREME COURT OF NEW YORK, ALBANY
COUNTY

(Supreme Court, Albany County Special Term, June 14,
1946)

(Decided July 20, 1946)

(Justice Isadore Bookstein, presiding)

APPEARANCES:

Whalen, McNamee, Creble & Nichols, Esqs., of Albany,
N. Y., Attorneys for the Petitioner, for the motion.

Donald L. Brush, Esq., of Albany, N. Y. (Robert G.
Blabey, Esq., of Albany, N. Y., of Counsel), Attorney for
the Respondent, opposed.

MEMORANDUM

BOOKSTEIN, J.:

Petitioner is a milk dealer, duly licensed as such, under Article 21 of the Agriculture and Markets Law. On or about February 11, 1946, it duly filed its application for a renewal of its license for the license year ending March 31, 1947. Shortly prior thereto, petitioner also duly applied for an extension of its license to permit operation of a milk plant at Greenwich, New York.

The application for a renewal of license was granted; the application for an extension to permit operation of [fol. 125] the plant at Greenwich was denied.

Petitioner has instituted this proceeding seeking the ultimate relief of favorable action on its aforesaid application for an extension of its operations.

This is a proceeding under Article 78 of the Civil Practice Act and the parties are apparently agreed that an order should be made transferring and referring the proceedings to the Appellate Division, Third Department, for determination.

On the return day of petitioner's notice herein, respondent, in accordance with Section 1293 of the Civil Practice Act, moved for an order dismissing as a matter of law, that part of the petition found in the paragraph thereof designated "15," that the order sought to be reviewed herein, in so far as it denied petitioner's application for an extension, "constituted a failure on the part

of the respondent to perform a duty of the respondent enjoined upon him by law.”

In practical effect, what respondent seeks to accomplish is the striking out, from the petition herein, of the language above quoted.

Respondent's quarrel with the language thus employed is that it constitutes this proceeding one in the nature of mandamus; that the allegations of the petition do not disclose that the petitioner has a clear, legal right to such relief; and that, in the circumstances set forth in the petition, a proceeding in the nature of mandamus will not lie.

[fol. 126] It is quite probable that whether the challenged allegation remains in the petition or not, the ultimate result will not be affected thereby, since, under Article 78, “when a suitor shows a right to some relief the court grants the relief to which he is entitled, unrestricted by the form of the proceedings brought by the aggrieved person. (Matter of Newbrand v. City of Yonkers, 285 N. Y. 164 (174)).

But, as recognized in the Newbrand case, *supra*, at pages 174 and 175, it is equally true, however, that so far as the questions of fact and of law, which the respondent would be called upon to meet, would differ in a proceeding in the nature of mandamus from one in the nature of certiorari.

Subdivision 3 of Section 1284 of the Civil Practice Act reads as follows:

“The expression ‘to compel performance of a duty specifically enjoined by law’ refers to all other relief heretofore available in a mandamus proceeding.”

The language complained of by respondent in part, is almost, in *haec verba*, the language of Subdivision 1 of Section 1296 of the Civil Practice Act, which reads as follows:

“In a proceeding under this article, the questions involving the merits to be determined upon the hearing are the following only: 1. Whether the respondent failed to perform a duty specifically enjoined upon him by law.”

[fol. 127] A proceeding which seeks to compel the performance of a duty enjoined by law upon public officers,

would, prior to the enactment of Article 78 of the Civil Practice Act, have been in the nature of mandamus. (Matter of DeLack v. Greene, 170 Misc. 309.)

Clearly, therefore the language of Subdivision 3 of Section 1284 and of Subdivision 1 of Section 1296 of the Civil Practice Act, and the language complained of are peculiarly and particularly applicable to a proceeding in the nature of mandamus.

Section 258-c of the Agriculture and Markets Law provides, among other things, that:

“No license shall be granted to * * * authorize the extension of an existing business by the operation of an additional plant * * * unless the commissioner is satisfied that the applicant is qualified by character, experience, financial responsibility and equipment to properly conduct the proposed business, that the issuance of the license will not tend to a destructive competition in a market already adequately served, and that the issuance of the license is in the public interest. ”

If a person filed an application for an extension, and the commissioner failed or refused to act thereon, one way or another, the commissioner would then be in the class of a person who “failed to perform a duty specifically enjoined upon him by law.” In such case, the aggrieved [fol. 128] party could institute a proceeding in the nature of mandamus, to compel the commissioner to make a determination either granting or denying the application; a proceeding could not be instituted solely to compel the granting of the license.

Once the commissioner has acted and denied the application, then the aggrieved party could institute a proceeding by way of certiorari to review the determination, since, by the express provisions of Section 258-d of the Agriculture and Markets Law, the determination of the commissioner becomes final, unless within thirty days from the date thereof, a proceeding is instituted to review such action by certiorari.

The petition in this proceeding discloses clearly that petitioner filed an application; that the commissioner acted in compliance with Section 258-c of the Agriculture and Markets Law, and, after a hearing, denied the application;

that, accordingly, the commissioner has performed the duty specifically enjoined upon him by law.

In other words, the conceded facts here demonstrate that petitioner's quarrel is not with a failure of the commissioner to act but with the result of his action.

In such a situation a proceeding in the nature of mandamus will not lie.

A petition fails to state a cause of action in a proceeding in the nature of mandamus, where it does not show a clear, legal right to the relief demanded. (Matter of Jaffe v. Board of Education, 265 N. Y. 160 [165].)

[fol. 129] In this case the petition shows no clear, legal right to an order of mandamus; in fact, it clearly shows the exact contrary.

Indeed, except for the language complained of, the entire petition, the prayer for relief therein, the notice thereon and the title itself fully demonstrate that this proceeding is one in the nature of certiorari and not in the nature of mandamus.

In such a situation, the language complained of is neither necessary nor proper.

Respondent contends that the language in the prayer for relief which seeks an order "annulling the respondent's determination *and directing the respondent to grant petitioner's application for an extension of its license*" taken together with the language complained of in paragraph "15" of the petition, establishes the proposition that petitioner seeks to make this proceeding one in the nature of mandamus.

This contention appears to be without merit, since in a proceeding in the nature of certiorari such a prayer for relief is entirely proper.

After all, what petitioner seeks is the granting of its application; that is the ultimate relief sought by it, whether it proceeds by way of mandamus or by way of certiorari.

Petitioner clearly could not obtain approval of its application in the situation existing in this case in a proceeding by way of mandamus, since there has been no failure of a discharge of a duty specifically enjoined upon respondent by law. The law required respondent to act upon petitioner's application; this he did; accordingly, mandamus will not lie.

[fol. 130] Petitioner might, upon its review of the determination of the respondent, obtain an order directing the

approval of its application for an extension, in a certiorari proceeding, depending entirely upon the conclusion of the Appellate Division.

The Appellate Division, depending upon its conclusion, after its review, can affirm the determination; or annul the same and remit the matter to the respondent for further consideration; or annul the determination and order the approval of the application, if it concludes, upon its review, that petitioner has a clear, legal right to such approval.

Certainly, in the past, the Appellate Division has annulled the determination of the commissioner and directed the approval of the application.

In the Matter of Eisenstein v. DuMond, 268 A. D. 320, a certiorari proceeding, the determination of the commissioner was annulled and the matter remitted to the commissioner.

In the Matter of Elite Dairy Production v. Ten Eyck, 271 N. Y. 488, also a certiorari proceeding, the Court of Appeals modified the order of the Appellate Division by striking out the "direction to issue a license" and remitted the matter to the commissioner with instructions to proceed in accordance with its opinion.

In the Matter of Dusingherre v. Noyes, 259 A. D. 582, reversed 284 N. Y. 304, also a certiorari proceeding, the Appellate Division annulled the determination of the commissioner and directed the issuance of a license. The Court [fol. 131] of Appeals reversed the Appellate Division and confirmed the determination of the commissioner. The reversal was on the merits and did not affect the proposition that, in a proper case, in a certiorari proceeding, the Appellate Division may reverse the determination of a commissioner and direct the granting of the application of a petitioner.

It seems quite clear that in this proceeding, in the nature of certiorari, the Appellate Division has the power, and the right, in its ultimate determination, to direct approval of petitioner's application; it is equally clear, on the facts set up in the petition, that such a direction could not issue in a proceeding in the nature of mandamus.

It is equally true that a different problem is presented for solution in the certiorari proceeding from that which is presented in a mandamus proceeding, even though the

ultimate result sought by petitioner in either case is the same, viz., approval of its application.

If that result were ultimately obtained, however, it would necessarily be for different reasons, both in law and in fact, if obtained in the one proceeding as against the other.

The petitioner's right to the relief sought, if it exists and can be established, is not affected by the removal from its petition of the language complained of; on the other hand, respondent is affected by its being permitted to remain, since his meeting of the issue tendered is different in the mandamus proceeding from what it is in the certiorari proceeding.

[fol. 132] Since the facts set forth in the petition show, beyond peradventure, that petitioner has no clear, legal right to a remedy by mandamus, the language complained of should be eliminated. Indeed, if it were permitted to remain, it could not be established, as the remaining allegations of the petition plainly demonstrate.

Accordingly, the motion of respondent to dismiss, as a matter of law, that part of the petition found in paragraph "15" thereof, which reads as follows:

"Petitioner respectfully submits that the Order in question, in refusing to grant an extension of the license to which petitioner was entitled, constituted a failure on the part of the respondent to perform a duty of the respondent enjoined upon him by law"

is granted.

Perhaps it would be more accurate to say the language quoted should be stricken from the petition.

If the determination of the commissioner was erroneous, it may well be that so far as the ultimate factual result is concerned, the one aggrieved may regard such erroneous determination as a failure to perform a legal duty; in a legal sense, such as is contemplated in Article 78 of the Civil Practice Act, affording the remedy in the nature of mandamus; that, of course, is not so.

The motion of the petitioner that the proceedings herein [fol. 133] be transferred and referred to the Appellate Division, Third Department, for determination, with the language complained of and hereinbefore quoted eliminated from the petition, is granted.

Original petition and notice, with proof of service, and respondent's answer and notice of motion transmitted to

the attorneys for petitioner, who will submit an order, in accordance with this opinion.

[fol. 134] STIPULATION WAIVING CERTIFICATION

Pursuant to § 170 of the Civil Practice Act, it is hereby stipulated that the papers as hereinbefore printed consist of true and correct copies of the notice of motion, petition, answer and return, and all the papers used before the Court below upon the motion, and the whole thereof, now on file in the office of the Clerk of the Supreme Court of the State of New York, County of Albany.

Certification thereof, pursuant to § 616 of the Civil Practice Act, is hereby waived.

Dated: Albany, New York, August —, 1946.

Whalen, McNamee, Creble & Nichols, Attorneys for
Petitioner. Donald L. Brush, Attorney for Re-
spondent.

[fol. 135] IN SUPREME COURT OF NEW YORK, APPELLATE
DIVISION, THIRD JUDICIAL DEPARTMENT

DECISION

In the Matter of the Application of H. P. Hood & Sons, Inc., Petitioner, for an order under Article 78 of the Civil Practice Act, to review a determination made by C. Chester DuMond, as Commissioner of Agriculture and Markets of the State of New York, Respondent.

Proceedings under Article 78 of the Civil Practice Act to review part of the determination of the respondent which granted petitioner, H. P. Hood & Sons, Inc., a milk dealer's renewal license to operate three milk plants in this State and denied the application for a license to establish and operate a fourth milk plant at Greenwich, New York.

Respondent contends that as the petitioner applied for and accepted a license to operate three milk plants in this State, it is precluded from making any attack upon the order which also denied a license to establish and operate a fourth plant. The applications were separately made and separately considered. There is no merit in the contention urged.

The Court at Special Term granted a motion to strike from the petition a paragraph which dealt with a legal issue involved. The issues involved were transferred to this Court and can there be disposed of (*Matter of Newbrand v. City of Yonkers*, 285 N. Y. 164 at page 174). The [fol. 136] statute provides that no license to operate a milk plant shall be issued by the Commissioner unless he is satisfied, among other things, that such issuance would not tend to a destructive competition in a market already adequately served, and that the issuance of the license is in the public interest (Sec. 258c of the Agriculture & Markets Law). Large discretion is vested in the Commissioner (Sec. 254 of the Agriculture and Markets Law). That discretion has not been abused (*Matter of Dusinger v. Noyes*, 284 N. Y. 304; *Matter of Kraft Cheese Co., Inc. v. Noyes*, 263 A. D. 761; *Matter of Elite Dairy Products v. Ten Eyck*, 271 N. Y. 488). The record justifies the conclusion reached.

Determination confirmed with \$50.00 costs and disbursements.

Heffernan, Brewster, Foster and Lawrence, JJ., concur.
Hill, P. J., concurs, in a separate memorandum.

[fol. 137] IN SUPREME COURT OF NEW YORK, APPELLATE
DIVISION, THIRD DEPARTMENT

CONCURRING MEMORANDUM

HILL, P. J.:

The language of the statute (Agriculture & Markets Law, Sec. 258-c) does not limit its scope, as contended by appellant, to benefits to be obtained for producers of milk. The clause concerning destructive competition, "in a market already adequately served" seems to apply to the ultimate purchasers of milk for domestic consumption, and contemplates an over-supply that would be injurious to the vendors rather than the producers. The requirement that the license should not be granted unless "in the public interest" is broad and inclusive. In *Wolf Packing Co. v. Court of Industrial Relations of Kansas* (262 U. S. 522) consideration was given to "the small extent of the injury" (p. 543) because of the limited amount of busi-

ness done by the Packing Company. Here one hundred fifty cans of milk is a relatively inconsequential amount. In *People v. Nebbia* (262 N. Y. 259; 291 U. S. 502) it was determined that the production of milk was a business which might be regulated in the public interest and for the public welfare. That case dealt with the fixing of prices. The matter of public health as affected by an inadequate supply of milk was considered in *State v. Auclair* (110 Vt. 147; 4 Atl. 2nd 107, 112). Were we to adopt the Vermont authority, the claimed possible shortage in "local markets such as Troy" may furnish a ground for the denial.

[fol. 138] At a Term of the Appellate Division of the Supreme Court, held in and for the Third Judicial Department, at the Court House in the City of Albany, New York, commencing on the 12th day of November, 1946.

Present: Honorable James P. Hill, Presiding Justice; Honorable Christopher J. Heffernan, Honorable O. Byron Brewster, Honorable Sydney F. Foster, Honorable Ellsworth C. Lawrence, Associate Justices.

ORDER OF CONFIRMATION

Petitioner H. P. Hood & Sons, Inc., having commenced the above entitled proceeding to review a determination of the respondent Commissioner of Agriculture and Markets of the State of New York made April 30, 1946, denying petitioner's application for an extension of its milk dealer's license to permit the equipment and operation of a milk plant at Greenwich, New York; and said proceeding having been duly referred to this court by the Albany County Special Term; and the matter having duly come on to be heard at the September, 1946, Term of this court; and John R. Titus, Esq., of counsel, having been heard for petitioner (Whalen, McNamee, Creble & Nichols, Esqs., appearing as petitioner's attorneys); and Robert G. Blabey, Esq., of counsel, having been heard for the respondent Commissioner of Agriculture and Markets (Donald L. Brush, Esq., appearing as respondent's attorney); and due deliberation having been had; and this court by its decision [fol. 139] handed down November 13, 1946, having unanimously confirmed the commissioner's determination, so reviewed with Fifty Dollars (\$50.00) costs and disbursements; now, therefore, it is

Ordered that the commissioner's determination as aforesaid be and the same hereby is confirmed with Fifty Dollars (\$50.00) costs and disbursements.

Heffernan, Brewster, Foster and Lawrence, J.J., concur.
Hill, P.J., concurs, in a separate memorandum.

John S. Herrick, Clerk.

NOTICE OF ENTRY

SIRS:

Please take notice of an Order of which the within is a copy duly granted in the within entitled action entered in the office of the Clerk of the Appellate Division, Third Judicial Department, on the 18th day of November, 1946, a true copy of which was thereafter entered in the office of the Clerk of the County of Albany on the 20th day of November, 1946.

Dated, Albany, N. Y., November 20, 1946.

Donald L. Brush, Counsel to the Department of Agriculture and Markets and Attorney for Respondent,
Office and P. O. Address, N. Y. State Office Building, Albany, N. Y.

To: Whalen, McNamee, Creble & Nichols, Esqs., 75 State Street, Albany, New York, Attorneys for Petitioner.

[fol. 140] IN COURT OF APPEALS OF NEW YORK

Present: Hon. John T. Loughran, Chief Judge, Presiding.

In the Matter of The Application of H. P. Hood & Sons, Inc., Petitioner,

For an order under Article 78 of the Civil Practice Act to review a determination made by C. Chester DuMond, as Commissioner of Agriculture & Markets of the State of New York, Respondent

ORDER GRANTING LEAVE TO APPEAL—April 17, 1947

A Motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the petitioner herein, and papers having been duly submitted thereon, and due deliberation thereupon had:

Ordered that the said motion be and the same hereby is granted.

A copy.

Raymond J. Cannon, Deputy Clerk. (Seal)

[fol. 141] IN SUPREME COURT OF NEW YORK, ALBANY COUNTY,

[Title omitted]

NOTICE OF APPEAL TO COURT OF APPEALS

To: Donald L. Brush, Esq., Attorney for Respondent. John S. Herrick, Esq., Clerk of the Appellate Division, Third Department. Donald L. Lynch, Esq., Clerk of the County of Albany.

SIRS:

Take Notice that pursuant to an order of the Court of Appeals duly granted and entered herein April 17, 1947, the above named petitioner H. P. Hood & Sons, Inc., hereby appeals to the Court of Appeals from the order of the [fol. 142] Appellate Division of the Supreme Court herein entered November 18, 1946, and a copy of which was thereafter entered in the office of the Clerk of the County of Albany on the 20th day of November, 1946, confirming a

determination of respondent, made herein April 30, 1946, which denied petitioner's application for an extension of petitioner's milk dealer's license to permit the equipment and operation of a milk plant at Greenwich, New York.

Dated: May 12, 1947.

Yours, &c., Whalen, McNamee, Creble & Nichols,
Attorneys for Petitioner, Office and Post Office Ad-
dress, 75 State Street, Albany, New York.

[fol. 143] STIPULATION WAIVING CERTIFICATION

Stipulated, pursuant to § 170 of the Civil Practice Act, that the foregoing return on appeal, consisting of the record in the Appellate Division herein, decision of the Appellate Division, concurring opinion per Hill, P. J., Appellate Division's order of confirmation, order granting leave to appeal to the Court of Appeals and notice of appeal to the Court of Appeals, contains true and correct copies of the whole of the respective originals thereof now on file and of record in the office of the Clerk of the County of Albany, whose certification thereof is hereby waived.

Dated, May 19, 1947.

Whalen, McNamee, Creble & Nichols, Attorneys for
Appellant; Donald L. Brush, Attorney for Re-
spondent; Robert C. Blabey, of Counsel.

[fol. 144]

COURT OF APPEALS

STATE OF NEW YORK, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 11th day of March, in the year of our Lord one thousand nine hundred and forty-eight, before the Judges of said Court.

Witness, The Hon. John T. Loughran, Chief Judge, Presiding. John Ludden, Clerk.

[fol. 145]

REMITTITUR—March 12, 1948

In the Matter of the Application of H. P. Hood & Sons, Inc., Appellant, for an Order, etc., to Review a Determination Made by C. CHESTER DUMOND, as Commissioner of Agriculture and Markets of the State of New York, Respondent

Be it Remembered, That on the 28th day of May in the year of our Lord one thousand nine hundred and forty-seven, H. P. Hood & Sons, Inc., the appellant in this cause, came here unto the Court of Appeals, by Whalen, McNance, Preble & Nichols, its attorneys, and filed in the said Court a Notice of Appeal and return thereto from the Order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And C. Chester Du Mond, as Commissioner of Agriculture and Markets, etc., the respondent in said cause, afterwards appeared in said Court of Appeals by Donald L. Brush, his attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

[fol. 146] Whereupon, The said Court of Appeals having heard this cause argued by Mr. John R. Titus of counsel for the appellant, and by Mr. Robert G. Blabey of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the Order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

W. H. M., J. S. C.

[fol. 147] Therefore, it is considered that the said Order be affirmed with costs as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

John Ludden, Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE

Albany, March 12, 1948.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk. (Seal of the Ct. of Appeals, State of New York.)

[fol. 148] At a Special Term of the Supreme Court held in and for the County of Albany at the Court House in the City of Albany, New York, on the 18th day of March, 1948.

Present: William H. Murray, Justice.

In the Matter of the Application of H. P. Hood & Sons, Inc., Petitioner-Appellant, for an Order under Article 78 of the Civil Practice Act to Review a Determination Made by C. CHESTER DU MOND, as Commissioner of Agriculture and Markets of the State of New York, Respondent

The appellant H. P. Hood & Sons, Inc., having appealed to the Court of Appeals of the State of New York from an order of the Appellate Division of the Supreme Court, Third Judicial Department, entered in the office of the Clerk of said Appellate Division on the 18th day of November, 1946, and a true copy thereof entered in the office of the Clerk of the County of Albany on the 20th day of November, 1946, which said Appellate Division order confirmed with Fifty Dollars (\$50.00) costs and disbursements a determi-

nation of the respondent Commissioner of Agriculture and Markets of the State of New York made April 30, 1946, denying appellant's application for an extension of its milk dealer's license to permit the equipment and operation of a milk plant at Greenwich, New York; and the said appeal having duly come on to be heard and having been argued in the said Court of Appeals by John R. Titus, Esq., of counsel, for the appellant, and by Robert G. Blabey, Esq., of counsel, for the respondent; and after due deliberation had thereon, the Court of Appeals did order and ad- [fol. 149] judge that the order of the Appellate Division of the Supreme Court appealed from as aforesaid be affirmed with costs,

Now, on reading and filing the remittitur from the said Court of Appeals dated March 12, 1948, and upon motion of Donald L. Brush, Esq., Robert G. Blabey, Esq., of counsel, attorneys for the respondent Commissioner of Agriculture and Markets of the State of New York, it is

Ordered that the order and judgment of the Court of Appeals as aforesaid be and the same hereby are made the order and judgment of this Court, and that the order of the Appellate Division appealed from herein be and the same hereby is affirmed with costs; and

It Is Further Ordered that a judgment of this Court be and hereby is directed to be entered herein by the Albany County Clerk in favor of the respondent commissioner herein and against the appellant H. P. Hood & Sons, Inc., for the costs awarded to the respondent to be taxed by the Albany County Clerk on the entry of judgment and to be entered and docketed in his office and enforced as a final judgment in an action.

Enter: Albany County, March 18, 1948.

William H. Murray, Justice of the Supreme Court.

[fol. 150]

STATE OF NEW YORK

SUPREME COURT, ALBANY COUNTY

In the Matter of the Application of H. P. HOOD & SONS, INC.,
Petitioner-Appellant, for an Order under Article 78 of
the Civil Practice Act to Review a Determination Made
by C. CHESTER DU MOND, as Commissioner of Agriculture
and Markets of the State of New York, Respondent

JUDGMENT FOR COSTS

An order of the Supreme Court in the above entitled matter made and entered in the Albany County Clerk's office on the 18th day of March, 1948, having directed the entry of a judgment here in favor of the above named respondent Commissioner of Agriculture and Markets of the State of New York and against the above named appellant H. P. Hood & Sons, Inc., for the costs awarded to said respondent by the order and remittitur of the Court of Appeals herein dated the 12th day of March, 1948; and the said remittitur of the Court of Appeals having been duly filed and entered herein; and the said order of the Supreme Court having directed that the order of the Court of Appeals be made the order of this Court;

Now, on motion of Donald L. Brush, Esq., Robert G. Blabey, Esq., of counsel, attorneys for the respondent, it is hereby

Ordered, Adjudged, and Decreed that the respondent Commissioner of Agriculture and Markets of the State of New York, whose official residence address is the Governor Alfred E. Smith State Office Building in the City of Albany, New York, recover of the appellant, H. P. Hood & Sons, Inc., whose principal office address is 500 Rutherford Avenue, Boston, Massachusetts, the sum of Two Hundred Sixteen Dollars and Ninety Cents (\$216.90), being his costs and [fol. 151] disbursements as taxed and that the respondent commissioner have execution thereof.

Judgment signed and entered this 31 day of March, 1948.

Donald L. Lynch, Albany County Clerk.

[fol. 152] In the Matter of H. P. HOOD & SONS, INC., Appellant, against C. CHESTER DU MOND, as Commissioner of Agriculture and Markets of the State of New York, Respondent

Decided March 11, 1948

Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the third judicial department, entered November 18, 1946; (transferred to the Appellate Division by an order of the Supreme Court at Special Term, entered in Albany County) which unanimously confirmed a determination of respondent Commissioner denying an application for an extension of petitioner's milk dealer's license to permit the equipment and operation of a milk plant at the village of Greenwich.

John R. Titus for appellant.

Robert G. Blaby and Donald L. Brush for respondent.

DESMOND, J.

We granted leave to appeal here, to review a unanimous confirmation by the Appellate Division of a determination of the State Commissioner of Agriculture and Markets. The commissioner had denied the application of petitioner for an extension of its milk dealer's license issued pursuant to section 257 of the Agriculture and Markets Law. The extension would have permitted petitioner to operate a milk receiving plant at Greenwich, New York, in addition to petitioner's other similar plants already licensed and operating at Eagle Bridge, Salem and Norfolk, in this State. Eagle Bridge is in Rensselaer County and Salem and Greenwich are in Washington County, Rensselaer County being adjacent to Washington County on the south, and both these counties being on the easterly edge of New York State, bordering on Massachusetts and Vermont. Petitioner's Norfolk establishment is in St. Lawrence County in another part of New York State, and serves a different area and a different group of milk producers. The present Eagle Bridge and Salem depots, however, are quite close together and the proposed Greenwich plant, for which a license has been refused, is ten miles from Salem and twelve miles from Eagle Bridge. Petitioner's main contentions on the appeal are: first, that the commissioner's order is violative of the Commerce Clause of the United States Constitution (art. I,

§ 8; cl. 3); and second, that the order is not supported by the commissioner's findings made after the hearings conducted by him, or by the evidence. The two concurring opinions in the Appellate Division^o both said that the commissioner had acted on adequate proof and appropriate findings. Neither opinion discussed the constitutional point and it was not raised in the petition for review under article 78 of the Civil Practice Act. However, it was argued in petitioner's brief in the Appellate Division, and so is available to appellant in this court (see *Jonge-Bloed v. Erie R. R. Co.*, 296 N. Y. 912).

Petitioner's business is wholly interstate in character. It purchases, at its several locations, milk delivered there by farmer-producers, weighs, tests and cools it (if not already cooled), then ships it, the same day, without any processing, to the Boston, Massachusetts, marketing area. Petitioner's procedures at the proposed Greenwich plant would be exactly the same. It appeared—and the commissioner found—that the new Greenwich plant would to some extent serve the convenience of petitioner and its suppliers. The Eagle Bridge and Salem depots have experienced some difficulty in the past in handling, before the 9:00 A. M. daily deadline for shipment out, the large quantities of milk brought there during the flush season. If the Greenwich facilities were added, petitioner would divert thither, and away from Salem and Eagle Bridge, some 300 cans of milk now arriving daily at Salem and Eagle Bridge, and would allow, but not require, any individual dairy farmer to use the depot nearest his farm. In addition, petitioner hoped, when and if it should go into operation at Greenwich, to take on some twenty to thirty new producers at the new place. Several other milk dealers have plants near Greenwich and some of them have facilities for handling more milk than they are now getting. The commissioner found all these things as facts, and found also that some Troy, New York, retail milk distributors now obtain milk in the area where applicant purchases and that "the supply of milk for the Troy market during the last short season of October through January was inadequate." It was the commissioner's "conclusion" that the opening of another milk plant by petitioner and the taking on by it of producers now delivering to other dealers, would tend to reduce the volume at those other dealers' plants, thus tending to increase milk handling costs there, that

there would be a tendency to deprive Troy and other local markets of their milk supply in flush seasons, that all producers now had outlets for their milk; that the licensing of the new Greenwich establishment would tend to destructive competition in an already adequately served market, and would not be in the public interest.

Petitioner's whole business, present and proposed, is interstate commerce (*United States v. Rock Royal Co-op., Inc.*, 307 U. S. 533; *Milk Control Board v. Eisenberg Farm Products*, 306 U. S. 346). A State cannot embargo the importation or exportation of legitimate articles of trade (see *City of Buffalo v. Reavey*, 37 App. Div. 228) since, if such power existed, to quote the classic language of *Oklahoma v. Kansas Natural Gas Co.* (221 U. S. 229, 255): "Pennsylvania might keep its coal, the Northwest its timber, the mining States their minerals." The order here attacked is of course not a direct prohibition of such exports, nor a prohibition in form, but petitioner insists that it is a prohibited interference with interstate commerce, since, according to petitioner, it "by its necessary operation prevents, obstructs or burdens such transmission" (*Pennsylvania v. West Virginia*, 262 U. S. 553, 596-597; see *People v. Cunard White Star, Ltd.*, 280 N. Y. 413). Similar attacks were made in *Milk Control Board v. Eisenberg Farm Products* (*supra*) on the enforcement, against milk bought for interstate shipment, of a Pennsylvania statute requiring that milk dealers like this petitioner, obtain State licenses, file surety bonds and pay to producers at least the minimum price fixed by the Pennsylvania Milk Control Board. The Supreme Court, by Justice Roberts, said (p. 352) that the real question was whether the prescription of prices fixed in an effort to control local conditions in the milk business, "constitutes a prohibited burden on interstate commerce, or an incidental burden which is permissible until superseded by Congressional enactment." Describing the Eisenberg Company's purchase of milk at its receiving stations in Pennsylvania as a "local business" and "essentially local in Pennsylvania," the Supreme Court pointed out that the receiver's transaction with the farmer was completed when the price was paid and that the receiver thereafter engaged "in conserving and transporting its own property." Distinguishing a number of earlier cases, the *Eisenberg* decision held that in licensing these dealers and fixing their prices, Pennsylvania did not "essay

to regulate or to restrain the shipment of the respondent's [fol. 154] milk into New York or to regulate its sale or the price at which respondent may sell it in New York.' We say the same as to the action of the New York commissioner (respondent here) in dealing with an essentially local situation. Petitioner, under its present, unenlarged license, may still buy, at its Eagle Bridge, Salem and Norfolk locations, as much milk as it can get, and may send it where it will. Petitioner proved that an additional location would serve the convenience of some of the dairymen and of itself. The commissioner, however, found that the producers were adequately served by existing facilities, and that petitioner's proposed new branch would have a tendency to draw customers and milk away from local markets, and set up undesirable competition between petitioner and other dealers. That was the kind of local milk situation with which the State is authorized to deal (*Nebbia v. New York*, 291 U. S. 502) and any interference with the free flow of interstate commerce was incidental only. It may be remarked that there is here no showing as to how much New York milk is exported across the State line. Absent such a showing, we cannot tell what proportion such interstate shipments bear to the whole of the production as to which the State licensing statute operates. In the *Eisenberg* case, where it was shown that only a small fraction of the milk produced in Pennsylvania went out of the State the court found that to be another reason why "the effect of the law on interstate commerce is incidental and not forbidden by the Constitution, in the absence of regulation by Congress" (306 U. S. at p. 353). New York's activity, it seems to us, is within the "residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it" (see *Southern Pacific Co. v. Arizona*, 325 U. S. 761, 767). Petitioner's answer to all this is that the determination here does not regulate, but in fact prohibits. As we see it, there is neither form nor substance of prohibition, only permissible regulation of local business.

Petitioner argues, further, that the commissioner's order here under attack, conflicts with Federal milk order No. 4 issued pursuant to the Agricultural Marketing Agreement Act of 1937 (U. S. Code, tit. 7, § 671 et seq.) which order regulates the handling, price, etc., of milk sold in interstate commerce in the Boston area and which Federal order is

valid as to this petitioner and its business (see *Hood & Sons v. United States*, 307 U. S. 588). We see no conflict between the Federal control set up by order No. 4 and the local licensing of dealers, here under scrutiny. If the New York licensing laws conflict with Federal order No. 4, then the Pennsylvania licensing held valid in the *Eisenberg* case (*supra*), was equally inconsistent with the Secretary of Agriculture's so-called "New York Price Order," or order No. 27, effective September 1, 1938, similar to the Boston order No. 4 and called to the Supreme Court's attention in the briefs in the *Eisenberg* case which was decided in February, 1939.

Petitioner's final attack on the commissioner's determination assails it as unreasonable and unsupported by any evidence. The Agriculture and Markets Law (§ 258-e) forbids the issuance of such a license "unless the commissioner is satisfied . . . that the issuance of the license will not tend to a destructive competition in a market already adequately served, and that the issuance of the license is in the public interest." The commissioner, as hereinabove noted, found, in petitioner's proposal, a tendency to destructive competition in an adequately served market, and that the public interest would not be served thereby. There was a basis for those findings, and we could not oppose any contrary views of ours, if we had any, to that of the State officer commissioned to make such [fol. 155] decisions.

The order should be affirmed, with costs.

Loughran, Ch. J., Lewis, Conway, Thacher, Dye and Fuld, JJ., concur.

Order affirmed.

CERTIFICATION OF TRANSCRIPT

STATE OF NEW YORK, ss:

Office of the Clerk of the County of Albany

I, Donald L. Lynch, Clerk of the said County of Albany and also Clerk of the Supreme Court, being courts of record held therein, do hereby certify that I have compared the annexed copies of remittitur from the Court of Appeals, order and judgment with the originals thereof filed in this office on the 18th day of March, 1948, and that the same are

correct transcripts therefrom and of the whole of said originals, and I further certify that I have compared the annexed copy of the opinion of the Court of Appeals in said case with the original thereof now on file in this office and that the same is a correct copy thereof and of the whole of said original opinion.

In Testimony Whereof, I have hereunto set my hand and affixed my seal of office this 12th day of May, 1948.

Donald L. Lynch, Albany County Clerk. (Seal.)

(6598)

[fol.157] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 11, 1948

The petition herein for a writ of certiorari to the Supreme Court of the State of New York, Albany County, is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: File No. 53,094, New York, Supreme Court, Albany County. Term No. 92. H. P. Hood & Sons, Inc., Petitioner, vs. C. Chester DuMond, Commissioner of Agriculture and Markets of the State of New York. Petition for writ of certiorari and exhibit thereto. Filed June 11, 1948. Term No. 92 O. T. 1948.

(8982)

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FILED

JUN 11 1948

CHARLES ELMORE LOPLEY
CLERK

In The Supreme Court of The United States

OCTOBER TERM, 1948

No. ~~11~~ **92**

H. P. HOOD & SONS, INC., PETITIONER

**C. CHESTER DEMOND, COMMISSIONER OF
AGRICULTURE AND MARKETS OF THE
STATE OF NEW YORK**

**PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT FOR THE COUNTY
OF ALBANY, STATE OF NEW YORK**

WARREN F. FARR,
Counsel for Petitioner

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In The Supreme Court of The United States

OCTOBER TERM, 1947

No.

H. P. HOOD & SONS, INC., PETITIONER

v.

**C. CHESTER DeMOND, COMMISSIONER OF
AGRICULTURE AND MARKETS OF THE
STATE OF NEW YORK**

**PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT FOR THE COUNTY
OF ALBANY, STATE OF NEW YORK**

The petitioner, H. P. Hood & Sons, Inc., prays that a writ of certiorari-issue to review the judgment entered in the above cause by the Supreme Court for the County of Albany, State of New York, as directed by remittitur of the Court of Appeals of the State of New York.

OPINIONS BELOW

The opinion of the Court of Appeals, affirming an order of the Appellate Division of the Supreme Court, is reported in 297 N. Y. 209, 78 N. E. (2d) 476. The opinion of the Appellate Division is reported in 271 App. Div. 394, 66 N.Y. S. (2d) 732.

JURISDICTION

The judgment of the Supreme Court for the County of Albany was entered on March 18, 1948, as directed by remittitur from the Court of Appeals issued on March 12, 1948. The jurisdiction of this Court is invoked under

Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925. The judgment below, entered pursuant to remittitur from the highest court of the State, sustained an order of the Commissioner of Agriculture and Markets of New York, acting under Section 258-c of Article 21 of the Agriculture and Markets Law of that State, which denied the petitioner a license to engage as a milk dealer at Greenwich, New York in the interstate purchase and shipment of milk. The petitioner's claim that that order violated the Commerce Clause of the Constitution of the United States (Article I, Section 8, Clause 3) was overruled. The federal question was raised and passed upon below as follows: Proceedings to review the order, instituted by the petitioner in the Supreme Court of the State of New York, were transferred, without hearing, to the Appellate Division of that court (R. 3). In its petition for review (R. 7-13), the petitioner had alleged, *inter alia*, that the order was not in conformity with law and was illegal and improper (R. 11). In its brief before the Appellate Division, where the case was initially heard, it asserted its rights under the Commerce Clause (R. 149). The Appellate Division sustained the Commissioner's action in a *per curiam* opinion without referring to the federal question raised (R. 135-139). Leave to appeal to the Court of Appeals was applied for on the ground that the order contravened the Commerce Clause. Such leave was granted (R. 148). In response to a suggestion that the federal question had not been properly presented, the Court of Appeals held (R. 149):

"However, it was argued in petitioner's brief in the Appellate Division, and so is available to the appellant in this court (see *Jonge-Bloed v. Erie R.R. Co.*, 296 N.Y. 912)."

The court's opinion then fully considered the petitioner's contention that the order violated the Commerce Clause on the ground that it obstructed petitioner's right to pur-

chase and ship milk in interstate commerce (R. 150-151) and conflicted with federal law regulating interstate commerce in milk (R. 151-152). That contention was overruled. Since, as the Court of Appeals held, the federal question was properly raised, and since it was necessarily considered and decided, this Court has jurisdiction to review the decision on certiorari. *Whitfield v. Ohio*, 297 U.S. 431, 436; *Nickey v. Mississippi*, 292 U.S. 393, 394; *Home Insurance Company v. Dick*, 281 U.S. 397, 407. See *Charleston Federal Savings & Loan Association v. Alderson*, 324 U.S. 182, 185-186.

QUESTIONS PRESENTED

1. Whether a state order denying a license to purchase and ship milk in interstate commerce on the ground that such operations will tend to increase the costs of competing dealers and to divert supplies from local markets obstructs interstate commerce in violation of the Commerce Clause of the Constitution of the United States (Article I, Section 8, Clause 3).

2. Whether such an order conflicts with existing federal laws regulating the handling of milk in interstate commerce.

STATUTES INVOLVED

The pertinent provisions of the Agriculture and Markets Law of New York and of the Agricultural Marketing Agreement Act (c. 296, 50 Stat. 246) are set forth in the Appendix, *infra*, pp. 16-24.

STATEMENT

The petitioner, a Massachusetts corporation, is a milk dealer engaged in purchasing milk in the New England states and the State of New York, shipping it to Boston, Massachusetts, and selling it in the Boston market for fluid

consumption (R. 7, 24). The petitioner's purchases of milk in New York for shipment to Boston are subject to Federal Milk Order No. 4, as amended, issued under the Agricultural Marketing Agreement Act (Appendix, *infra*, p. 21), regulating the handling of milk sold in the Greater Boston marketing area (R. 47, 60-61, 151). Under the provisions of Section 257 of Article 21 of the Agriculture and Markets Law of New York (Appendix, *infra*, p. 16), no milk dealer may buy milk from producers, or deal in, handle, sell or distribute milk in New York, unless licensed to do so by the Commissioner of Agriculture and Markets. The petitioner is, and for some years has been, duly licensed to purchase milk from producers at its three plants in New York, at Eagle Bridge, Salem and Norfolk (R. 8, 17, 33, 114).

On January 30, 1946, the petitioner applied for an extension of its license to permit it to purchase milk from producers at an additional plant, formerly operated by another dealer, at Greenwich, New York (R. 116). A hearing on the application was held (R. 35-109), at which milk dealers competing with the petitioner in the vicinity of Greenwich strenuously opposed the extension (R. 69-109).¹ They complained that the petitioner was not subject to the same health regulations applicable to dealers selling in New York State (R. 64-65, 89, 92-94, 100) and suggested that the Federal Milk Order applicable to the Boston marketing area gave the petitioner a competitive advantage (R. 53, 93, 106-107). Evidence was introduced as to a temporary shortage of supply in the Troy market (R. 75-77, 87) and a substantial portion of the hearing was devoted to the objection that granting the extension would result in taking milk out of the state (R. 87, 89, 102-103, 105-107).

¹They included the Dairymen's League (R. 69), Sheffield Farms (R. 80), Middletown Milk & Cream Company (R. 82), Vermont Milk & Cream Company (R. 85), Washington and Rensselaer County Co-operative Association (R. 88), Gold Medal Farms, Inc. (R. 91) and General Ice Cream Company (R. 104)..

The Commissioner found that the business which the petitioner proposed to conduct at Greenwich, like its business at its other plants in New York, would consist merely of purchasing milk and shipping it in fluid form, without processing, directly to Boston, Massachusetts (R. 17-18, 39-42). He further found that the petitioner had had difficulty in complying with the requirements of the Board of Health of Boston, Massachusetts (in which city the milk was sold) with respect to cooling milk before shipment because of the inability of its existing plants to handle the volume of milk delivered to them (R. 17); that it proposed to divert to the plant at Greenwich milk deliveries of producers living in that vicinity who were currently delivering to its plants at Eagle Bridge and Salem (R. 17-18); that such producers would save hauling expense by making deliveries to the new plant (R. 18); and that the petitioner intended to "take on 20 or 30 new producers" at Greenwich in addition to those who might shift from its plants at Eagle Bridge and Salem (R. 18). He "concluded" that if producers currently delivering to competing dealers in the vicinity should shift to the petitioner's new plant, it would tend to reduce the volume of milk handled by such dealers and thus to increase their costs (R. 21). Further, if such a shift occurred, it would tend to deprive local markets of supplies needed during the short season (R. 21). For these reasons, he determined that the extension "would tend to a destructive competition in a market already adequately served and would not be in the public interest" (R. 21), and, therefore, denied the extension (R. 15, 21). Simultaneously, however, he renewed the petitioner's license so far as its existing business was concerned (R. 15, 21, 32, 33).

In proceedings to review the Commissioner's denial of the extension, the Appellate Division of the Supreme Court of New York sustained his determination (R. 138-139). On appeal, the Court of Appeals affirmed (R. 152),

holding that, on the basis of the Commissioner's conclusions that "petitioner's proposed new branch would have a tendency to draw customers and milk away from local markets and set up undesirable competition between petitioner and other dealers" (R. 151), the refusal to extend petitioner's license was a permissible regulation of interstate commerce, and that there was no conflict between the Commissioner's order and federal regulation of interstate commerce in milk (R. 152).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that a state may deny a license to purchase milk in interstate commerce and ship it out-of-state on the ground that such purchases and shipment would tend to increase the costs of competing dealers and to divert milk from local markets.

2. In holding that denial on such grounds of a license to purchase milk in interstate commerce and ship it out-of-state is not a violation of the Commerce Clause of the Constitution of the United States (Article I, Section 8, Clause 3).

3. In holding that an order denying a license to purchase milk in interstate commerce and ship it out-of-state on the ground that such purchases and shipment would tend to increase the costs of competing dealers and to divert milk from local markets does not conflict with the Agricultural Marketing Agreement Act and Federal Milk Order No. 4, as amended.

4. In holding that such an order is not a violation of the Commerce Clause of the Constitution of the United

States (Article I, Section 8, Clause 3) because in conflict with federal laws regulating interstate commerce in milk.

5. In holding that the findings and evidence on which the order of the Commissioner of Agriculture and Markets was based warranted denial of a license to purchase milk in interstate commerce and ship it out-of-state.

6. In sustaining the order of the Commissioner of Agriculture and Markets denying the petitioner's application for an extension of its license.

REASONS FOR GRANTING THE WRIT

1. In holding that a state may refuse to permit interstate purchases to be made in a particular marketing area in the State on the ground that such purchases would tend to draw supplies from that market and to set up undesirable competition with other dealers, the Court of Appeals has decided a federal question of substance in a manner not in conformity with decisions of this Court.

The petitioner's business, present and proposed, of purchasing milk in New York and shipping it directly to an out-of-state market is wholly interstate in character (*United States v. Rock Royal Co-operative, Inc.*, 307 U. S. 533, 568; *Currin v. Wallace*, 306 U. S. 1, 10; *Dahmke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, 290-291), and the Court of Appeals so held (R. 150). The Commissioner's order, therefore, is not a regulation of a local activity "imposed before any operation of interstate commerce occurs" (*Parker v. Brown*, 317 U. S. 341, 361), but restricts interstate commerce itself.

We do not contend that such interstate business is immune from the requirement of the New York statute (Sections 257-258j, Article 21, Agriculture and Markets Law, Appendix, *infra*, pp. 16-21) that milk dealers be licensed and bonded in order to prevent fraud and to secure honest

dealing and financial responsibility. *Robertson v. California*, 328 U. S. 440; *Milk Control Board v. Eisenberg Farm Products*, 306 U. S. 346. That the petitioner has complied with the requirements directed to that end, and has established its qualifications to carry on its business properly (see Section 258-c, Article 21, Agriculture and Markets Law, Appendix, *infra*, pp. 18-21), is evident from the renewal of its license to continue its existing business (R. 21, 28, 33-34). In denying an extension, the Commissioner's order goes further than to prevent fraudulent or unsound or unsafe activities. It limits interstate operations, not because of their harmful character, but because the normal consequences of competition may tend to prejudice other dealers and to deplete local supplies. Applicable decisions of this Court establish that lawful interstate trade may not be restricted for such reasons.

A state may not "suppress or mitigate the consequences of competition between the states" or "neutralize the economic consequences of free trade among the states." *Baldwin v. Seelig*, 294 U. S. 511, 522, 526. State regulation attempting or accomplishing such a result has been consistently invalidated. *Buck v. Kuykendall*, 267 U. S. 307; *George W. Bush & Sons Company v. Maloy*, 267 U. S. 317; *Baldwin v. Seelig*, 294 U. S. 511; *Hale v. Bimco Trading, Inc.*, 306 U. S. 375. Cf. *Foster-Fountain Packing Co. v. Haydel*, 278 U. S. 1. The *Buck* and *Bush Company* cases, *supra*, condemned state action strikingly similar to that of the Commissioner here. The *Buck* case involved a state statute prohibiting common carriers for hire from operating within the state without a certificate from the state Director of Public Works. Such a certificate was denied to a carrier who proposed to engage within the state exclusively in interstate commerce, on the ground that the territory in which the applicant proposed to operate was "already being adequately served." Overruling the contention that the state had the power to exclude unnecessary competing

carriers, the Court held that the statute as applied was a forbidden obstruction of interstate commerce. In the *Bush Company* case a similar state statute authorized denial of a permit to operate as a common carrier if the Public Service Commission "deems the granting of such permit prejudicial to the welfare and convenience of the public." A permit was refused to an interstate carrier, the Commission basing its refusal on the consideration "whether or not existing lines of transportation would be benefited or prejudiced and in this way the public interest affected" (267 U. S. at 324). As in the *Buck* case, the statute as thus applied was held to conflict with the Commerce Clause.

The denial of the petitioner's application for an extension falls squarely within the condemnation of these cases. The New York statute forbids the issuance of a license to extend an existing business unless the Commissioner is satisfied that it "will not tend to a destructive competition in a market already adequately served" and "is in the public interest." Acting under this statute, the Commissioner found that existing plants in the vicinity of Greenwich had capacity to handle more milk (R. 19, 20), and concluded that the petitioner's entrance into that territory might divert supplies from them and, by reducing the volume they handled, might tend to increase their costs of operation (R. 21). For this reason he determined that the petitioner's operations would "tend to a destructive competition" and would not be "in the public interest" (R. 21). In short, if a market is once "adequately served", newcomers must be excluded since they may acquire part of the available supply and thus affect the costs of those already in the field. As in the *Buck* and *Bush Company* cases, adequacy of existing service and prejudice to competing dealers is made the test of the right to engage in interstate commerce.

The Commissioner's further conclusion that "If applicant takes producers now delivering milk to local markets

such as Troy, it will have a tendency to deprive such markets of a supply needed during the short season" (R. 21), furnishes no better support for the order. State restraint of the interstate purchase and shipment of lawful articles of commerce cannot be justified on the ground that supplies are needed to satisfy local requirements. *Oklahoma v. Kansas Natural Gas Co.*, 221 U. S. 229; *Pennsylvania v. West Virginia*, 262 U. S. 553. Cf. *Foster-Fountain-Packing Co. v. Haydel*, 278 U. S. 1.

The situation with which the Commissioner's order is concerned, is not, as the opinion below suggests (R. 151), "essentially local". The petitioner's purchases of milk in New York are governed by Federal Milk Order No. 4, as amended (Title 7, Code of Federal Regulations, Part 904), issued under the Agricultural Marketing Agreement Act (Appendix, *infra*, pp. 21-24) (R. 47, 60-61, 151; see *H. P. Hood & Sons, Inc. v. United States*, 307 U. S. 588). The basic purpose of that Act, and of the several milk orders issued thereunder, in regulating the interstate and intra-state handling of milk, was to prevent the disruption of commerce in that commodity and to assure adequate supplies for metropolitan centers despite fluctuations in production and competition in the industry. See *United States v. Rock Royal Co-operative, Inc.*, 307 U. S. 533, 549-550. Cf. *United States v. Wrightwood Dairy Co.*, 315 U. S. 110; *Stark v. Wickard*, 321 U. S. 288. Because of its multi-state nature the milk industry could not be effectively regulated by isolated states. Cf. *Baldwin v. Seelig*, 294 U. S. 511; *Cloverleaf Butter Co. v. Patterson*, 315 U. S. 148, 167. Uniform regulation by the Federal Government was required. The problems with which the Commissioner's order deals are thus not matters of purely local concern, having such slight impact on the national commerce that Congress cannot adequately handle them (See, *e.g.*, *Parker v. Brown*, 317 U. S. 341, 362-363; *California v. Thompson*, 313 U. S. 109, 113). Nor does his action coincide with federal policy.

The federal scheme is to regulate prices to be paid producers and assure them a fair division of the fluid milk market in order to encourage interstate commerce in milk. See *United States v. Rock Royal Co-operative, Inc.*, 307 U. S. 533, 550. Congress has not authorized any proration or limitation of interstate commerce in that commodity, as it has in the case of other agricultural products. (See, e.g., *Wickard v. Filburn*, 317 U. S. 111; *Parker v. Brown*, 317 U. S. 346, 353). On the contrary, it has specifically provided (Agricultural Marketing Agreement Act, Section 8c(5)(G)):

"No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States."

The shortage in supply, which the Commissioner found to exist in the Troy market "during the last short season of October through January (1945-1946) (R. 19) extended throughout the State of New York (R. 105) and to other Eastern cities as well (R. 53, 88). Inadequacy of supply during the so-called "short season" is a recurrent phenomenon in metropolitan markets. Thus, the Market Administrator under Federal Milk Order No. 4, as amended, determined that the supply of milk available for the Greater Boston market, part of which comes from petitioner's plants in New York, was insufficient to meet the demand for fluid milk during the short season of 1946-1947 and of 1947-1948.² To meet such emergencies, federal regulation seeks to encourage the importation of milk from other sections. New York, going its own way, seeks to preserve milk

²Declaration of emergency October 11, 1946, (11 F.R. 12221, 12223), terminated January 20, 1947 (12 F.R. 489). Declaration of emergency October 29, 1947 (12 F.R. 7048) terminated March 4, 1948 (13 F.R. 1261).

for itself. Such action "by its necessary operation is a means of gaining a local benefit by throwing the attendant burdens on those without the state" (*South Carolina State Highway Department v. Barnwell Brothers, Inc.*, 303 U. S. 177, 186) and conflicts with the federal purpose.

Recognizing that a state may not prohibit lawful interstate trade, the opinion below answers that there is in fact no obstruction here, since "Petitioner, under its present, unenlarged license, may still buy, at its Eagle Bridge, Salem and Norfolk locations, as much milk as it can get and may send it where it will" (R. 151). The suggestion is, in effect, that by licensing a dealer to do an interstate business in a single locality, a state may deny him permission to operate any place else without thereby obstructing interstate commerce. Such an argument completely overlooks the realities of the petitioner's business. The Commissioner found that at its Eagle Bridge and Salem plants the petitioner was unable to handle the volume adequately because of difficulty in cooling it in conformity with the requirements of the Boston Board of Health (R. 17). That was the reason that the Greenwich license was sought (R. 40, 116). The petitioner's third plant, at Norfolk, as the opinion below points out, is "in another part of New York State, and serves a different area and a different group of milk producers" (R. 148). Freedom to buy "all the milk it can get" at existing plants does not meet the petitioner's need to buy and ship at Greenwich. Moreover, if, as is suggested, there is no legal or practical obstacle to the petitioner's purchasing milk produced in the Greenwich area, provided delivery is made at petitioner's existing plants, the alleged justification for the order completely disappears. The State cannot have it both ways: that protection of local dealers and consumers makes it necessary to prevent diversion of milk from the Greenwich area, and yet that the petitioner is free, legally and in fact, to purchase and ship all the Greenwich milk it wants.

Milk Control Board v. Eisenberg Farm Products, 306 U.S. 346, on which the Court of Appeals relies, furnishes no support for its holding. In that case a Pennsylvania statute, requiring milk dealers to obtain a license, file a surety bond and pay producers a minimum price, was sustained as applied to a dealer whose purchases were wholly interstate. That statute did not prevent any milk dealer from making purchases where and to the extent he pleased if the required bond were filed and producers were paid the minimum price. As this Court pointed out (at p. 352): "The Commonwealth does not essay to regulate, or to restrain the shipment of the respondent's milk to New York." But denial of the right to purchase and ship at Greenwich is just such a restraint. The *Eisenberg* case sustained a regulation of the conditions on which interstate purchases could be made, not a refusal, as here, to let them be made. The distinction is plain. In *Robertson v. California*, 328 U.S. 440, 460, in holding that the state could exclude out-of-state insurance companies and their representatives if they did not meet the state's requirements for minimum reserves, this Court observed: "Their remedy is not to destroy the regulatory reserve conditions, but to comply with them." Here the petitioner has no such remedy. It is excluded from the Greenwich market, not because of the nature of its business, but because that market is "already adequately served" and local supplies have been short.

The question whether such exclusion is forbidden by the Commerce Clause is one of substance. Only a single plant is involved in the present controversy. But the ground on which a license to purchase milk at that plant is denied would preclude the petitioner and other milk dealers from obtaining a license to engage in interstate purchases in any area of the state where competing businesses or local consumers might be prejudiced.

2. The holding that there is no conflict between the Commissioner's order and federal laws regulating interstate handling of milk rests on a misconception of *Milk Control Board v. Eisenberg Farm Products*, 306 U.S. 346, and is not in accord with applicable decisions of this Court. In the *Eisenberg* case no question of conflict was raised. As this Court said (at p. 351):

"The question for decision is whether, *in the absence of federal regulation*, the enforcement of the statute is prohibited by Article I, §8 of the Constitution." (Italics supplied.)

Moreover, the distinction between the type of regulation involved in the *Eisenberg* case and the Commissioner's order is plain. We do not urge that all provisions of New York's Agricultural and Markets Law with respect to licensing milk dealers are precluded by federal regulation. A local requirement that dealers be honest and responsible is not incompatible with federal policy. But the refusal of a license because interstate purchases of milk may prejudice competing dealers and diminish local supplies frustrates that policy. Through stabilizing the price and broadening the outlets for fluid milk, Congress sought to eliminate the dangers of cut-throat competition³ and to assure the distribution of an adequate supply of milk in interstate commerce. The Commissioner's order has a contrary effect. It limits producers' outlets to those dealers already in business in the Greenwich market; it deprives producers of the financial savings which would result from a shorter haul to the petitioner's proposed plant (R. 18); and it restricts the supply of milk available for distribution to markets outside New York. The order thus stands as an obstacle to the accomplishment of the full purposes and

³See also Section 8c(7) (A) of the Act authorizing the inclusion in milk orders of terms prohibiting unfair methods of competition.

objectives of federal regulation. As such, it is invalid under the Commerce Clause. *Hill v. Florida*, 325 U.S. 538; *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148; *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218; *Hines v. Davidson*, 312 U.S. 52.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

WARREN F. FARR

Counsel for Petitioner

APPENDIX

Article 21 of the Agriculture and Markets Law of New York:

§257. *Licenses to milk dealers.* No milk dealer shall buy milk from producers or others or deal in, handle, sell or distribute milk unless such dealer be duly licensed as provided in this article. It shall be unlawful for a milk dealer to buy milk from or sell milk to a milk dealer who is unlicensed, or in any way deal in or handle milk which he has reason to believe has previously been dealt in or handled in violation of the provisions of this chapter. The commissioner may by official order exempt from the license requirements provided by this article, milk dealers who purchase or handle milk in a total quantity not exceeding three thousand pounds in any month, and/or milk dealers selling milk in any quantity in markets of one thousand population or less. Stores and farmers (including individuals and partnerships but not corporations) selling not more than one hundred quarts daily average of milk on the farm where produced to consumers coming there for it shall be exempt from the license requirements provided by this article.

§258. *Application for license.* An applicant for a license to operate as a milk dealer shall file an application upon a blank prepared under authority of the commissioner. An applicant shall state such facts concerning his circumstances and the nature of the business to be conducted as in the opinion of the commissioner are necessary for the administration of this chapter. Such application shall be accompanied by the license fee required to be paid. The commissioner may classify licenses and may issue licenses to milk dealers to carry on a certain kind of business only, or limited to a particular city or village or to a particular market or markets in the state, and may specify the place or places where milk may be received from producers.

The license year shall commence on April first and end on March thirty first following. An application

must be duly made at least thirty days before the commencement of the license year by all milk dealers then doing business, except that for the license year ending March thirty-first, nineteen hundred thirty-five, application shall be duly made within thirty days after this article takes effect by all milk dealers then engaged in business.

§258-a. *License fees.* A milk dealer receiving, purchasing, handling or selling during any of the twelve calendar months immediately preceding the period for which the license is issued a daily average total quantity of milk not exceeding four thousand pounds shall pay a license fee of twenty-five dollars; and for each additional four thousands pounds of milk or fraction thereof received, purchased, handled or sold, the license fee shall be increased twenty dollars. In no event, however, shall a license fee in excess of five thousand dollars be required.

An applicant who has not previously engaged in such business shall pay the minimum license fee as provided herein for the type of business which he proposes to conduct. Any such applicant who during any calendar month of the first year covered by his license receives, purchases, handles or sells a greater volume of milk than that upon which the license fee paid by such milk dealer was based shall for each additional four thousand pounds of milk or fraction thereof pay an additional license fee of twenty dollars.

It is not the intent that milk utilized by the applicant or licensee or sold by him in the form of manufactured products shall be included in the determination of the amount of license fee, but the fluid milk equivalent of condensed or concentrated milk, except when sold in hermetically sealed cans, and/or of cream, shall be included in such determination. Sales by a milk dealer of milk outside of the state not involving the receipt or handling or distribution within the state shall not be included in the determination of the license fee.

The commissioner may, by rule or order, provide for licensing, at any rate of license fee less than the

rates herein fixed, any milk dealer or class of milk dealers, generally or in a particular market, which he is authorized to exempt from license requirements.

A milk dealer who is a broker and who handles no milk physically and a milk dealer who neither buys nor sells milk but who operates a plant in which milk is pasteurized, processed or handled shall pay a license fee of twenty-five dollars.

A milk dealer which is a producers' bargaining and collecting co-operative and does not operate milk plants shall pay a license fee of twenty-five dollars.

A milk dealer receiving only milk utilized or sold in the form of manufactured products, other than condensed or concentrated milk, except when sold in hermetically sealed cans, and/or cream, shall pay a license fee of ten dollars.

§258-b. *Bonds and enforcement.*

1. Each milk dealer buying milk from producers for resale or manufacture or receiving milk from producers on consignment for the purpose of sale or manufacture, shall execute and file a bond, unless relieved therefrom as hereinafter provided. The bond shall be upon a form prescribed by the commissioner, shall be in the sum fixed by him, but not less than two thousand dollars, shall be executed by a surety company authorized to do business in this state, and shall be conditioned for the prompt payment of all amounts due to producers for milk sold by them to such licensee, during the license year. The bond shall be approved by the commissioner.

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§258-c. *Granting and revoking licenses.* No license shall be granted to a person not now engaged in business as a milk dealer except for the continuation of a now existing business, and no license shall be granted to authorize the extension of an existing business by the operation of an additional plant or other new or additional facility, unless the commissioner is

satisfied that the applicant is qualified by character, experience, financial responsibility and equipment to properly conduct the proposed business, that the issuance of the license will not tend to a destructive competition in a market already adequately served, and that the issuance of the license is in the public interest. The commissioner may decline to grant or renew a license or may suspend or revoke a license already granted, upon due notice and opportunity of hearing to the applicant or licensee, when he is satisfied of the existence of any of the following reasons:

(a) That a milk dealer has rejected, without reasonable cause, any milk purchased or has rejected without reasonable cause or reasonable advance notice, milk delivered in ordinary continuance of a previous course of dealing, except where contract has been lawfully terminated.

(b) That the milk dealer has failed to account and make payment without reasonable cause, for any milk purchased.

(c) That the milk dealer has committed any act injurious to the public health, public welfare, or to trade or commerce in demoralization of the price structure of pure milk to such an extent as to interfere with an ample supply thereof for the inhabitants of the state affected by this article which is hereby declared to be injurious to the public health, public welfare and to trade and commerce and evidence of a course of conduct on the part of the licensee tending to such demoralization shall be construed to be prima facie evidence of a violation of this section.

(d) Where the milk dealer is insolvent or has made a general assignment for the benefit of creditors or has been adjudged a bankrupt or where a money judgment has been secured against him, upon which an execution has been returned wholly or partly unsatisfied.

(e) Where the milk dealer has continued in a course of dealing of such a nature as to satisfy

the commissioner of his inability or unwillingness properly to conduct the business of receiving or selling milk or to satisfy the commissioner of his intent to deceive or defraud producers or consumers.

(f) Where the milk dealer has been a party to a combination to fix prices, contrary to law. A cooperative association of dairymen organized under or operated pursuant to the provisions of chapter seventy-seven of the consolidated laws and engaged in making collective sales or marketing for its members or shareholders of dairy products produced by its members or shareholders shall not be deemed or construed to be a conspiracy or combination in restraint of trade or an illegal monopoly nor shall the contracts, agreements, arrangements or combinations heretofore or hereafter made by such association, or the members, officers or directors thereof, in making such collective sales and marketing and prescribing the terms and conditions thereof, be deemed or construed to be conspiracies or to be injurious to public welfare, trade or commerce, if otherwise authorized by such chapter or law.

(g) Where there has been a failure either to keep records or to furnish the statements or information required by the commissioner.

(b) Where it is shown that any statement upon which the license was issued is or was false or misleading or deceitful in any particular.

(i) Where the applicant or licensee has been convicted of a felony.

(j) Where the applicant is a partnership or a corporation and any individuals holding any position or interest or power of control therein has previously been responsible in whole or in part for any act on account of which a license may be denied, suspended or revoked, pursuant to the provisions of this article.

(k) Where the milk dealer has violated any of the provisions of this chapter.

(l) Where the milk dealer has been duly required to give a bond or an additional bond and has failed to do so.

(m) Where the required permit from the local health officer has terminated or been revoked.

(n) Where the milk dealer has ceased to operate the milk business for which the license was issued.

The commissioner may grant or renew a license or may decline to suspend or revoke a license conditionally, or upon the agreement of the licensee or applicant to do or omit to do any definite act, but such condition and/or agreement must have some appropriate relation to the administration of this article.

Whenever a milk dealer's license is denied or revoked there shall be filed in the office of the division of milk control a memorandum by the director or by the person who presided at the hearing given to the applicant or licensee which memorandum shall briefly state the reasons for the denial or revocation of the license, but formal findings of fact shall not be required to be made or filed.

Agricultural Marketing Agreement Act of 1937 (c. 296, 50 Stat. 246), 7 U.S.C. §§601, *et seq.*

"Sec. 8c. (1) The Secretary of Agriculture shall, subject to the provisions of this section, issue and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity or product thereof, as is in the current of interstate or foreign

commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof."

"(2) Orders issued pursuant to this section shall be applicable only to the following agricultural commodities and the products thereof: (except products of naval stores and the products of honey-bees), or to any regional, or market classification of any such commodity or product: Milk, fruits (including pecans and walnuts but not including apples and not including fruits, other than olives, for canning), tobacco, vegetables (not including vegetables, other than asparagus, for canning), soybeans, hops, honey-bees and naval stores as included in sections 91 to 99 of this title and standards established thereunder (including refined or partially refined oleoresin)."

"(5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7)) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: *Provided*, That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered: subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler or by all handlers; among producers and associations of producers, on the basis of their marketings of milk during a representative period of time.

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection (5), providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) hereof.

(E) Providing (i) except as to producers for whom such services are being rendered by a cooperative marketing association, qualified as provided in paragraph (F) of this subsection (5), for market information to producers and for the verification of weights, sampling, and testing of milk purchased from producers, and for making appropriate deductions therefor from payments to producers, and (ii) for assurance of, and security for, the payment by handlers for milk purchased.

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(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States."

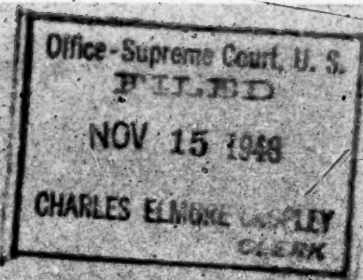
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"(7) In the case of the agricultural commodities and the products thereof specified in subsection (2) orders shall contain one or more of the following terms and conditions:

(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

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**LIBRARY
SUPREME COURT, U. S.**



No. 92

In the Supreme Court of the United States

OCTOBER TERM, 1948

H. P. HOOD & SONS, INC., PETITIONER

v.

**C. CHESTER DeMOND, COMMISSIONER OF
AGRICULTURE AND MARKETS OF THE
STATE OF NEW YORK**

**ON WRIT OF CERTIORARI
TO THE SUPREME COURT FOR THE COUNTY
OF ALBANY, STATE OF NEW YORK**

BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 92

H. P. HOOD & SONS, INC., PETITIONER

v.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals of the State of New York, affirming an order of the Appellate Division of the Supreme Court of that State, is reported in 297 N. Y. 209, 78 N. E. (2d) 476. The opinion of the Appellate Division is reported in 271 App. Div. 394, 66 N. Y. S. (2d) 732.

JURISDICTION

The judgment of the Supreme Court for the County of Albany was entered on March 18, 1948 (R. 109), as directed by remittitur from the Court of Appeals issued on March 12, 1948 (R. 107). The petition for a writ of certiorari was filed on June 11, 1948 and was granted on October 11, 1948 (R. 117). The jurisdiction of this Court rests on Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925.

STATUTES INVOLVED

The statutes involved are Article 21 of the Agriculture and Markets Law of the State of New York and the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246), 7 U.S.C. §§601 *et seq.*, which reenacts and amends the Agricultural Adjustment Act of 1933 (48 Stat. 31) as amended by the Act of August 24, 1935 (49 Stat. 750). The pertinent provisions of these statutes are set out in the Appendix, *infra*.

The federal regulation involved is Order No. 4 as amended which regulates the handling of milk in the Greater Boston, Massachusetts, marketing area (United States Department of Agriculture, Production and Marketing Administration, Title 7, Code of Federal Regulation, Part 904).

QUESTIONS PRESENTED

1. Whether a state order denying a license to purchase and ship milk in interstate commerce on the ground that such operations will tend to increase the costs of competing dealers and to divert supplies from local markets obstructs interstate commerce in violation of the Commerce Clause of the Constitution of the United States (Article I, Section 8, Clause 3).

2. Whether such an order conflicts with existing federal laws regulating the handling of milk in interstate commerce.

STATEMENT

The petitioner, a Massachusetts corporation, is a milk dealer engaged in purchasing milk in the New England states and the State of New York, shipping it to Boston, Massachusetts, and selling it in the Boston market for fluid consumption (R. 4,

14). It has purchased milk in New York for shipment to Boston since about 1900 (R. 36). It operates three milk plants in that state, at Eagle Bridge, Salem and Norfolk, at which milk is received for such out-of-state shipment (R. 10, Finding 2; R. 111). All its purchases of milk for shipment to Boston are subject to Federal Milk Order No. 4, as amended, issued under the Agricultural Marketing Agreement Act (Appendix, *infra*, p. 52), regulating the handling of milk sold in the Greater Boston marketing area (R. 30, 40-41, 151-52).

Article 21 of the Agriculture and Markets Law of New York (Appendix, *infra*, p. 46), provides that no milk dealer may buy milk from producers, or deal in, handle, sell or distribute milk in New York, unless licensed to do so by the Commissioner of Agriculture and Markets (Section 257). To obtain a license a dealer must pay a substantial fee (Section 258-a) and execute and file a surety bond, in a sum not less than two thousand dollars, conditioned on the prompt payment of all amounts due to producers for milk sold by them to the licensee (Section 258-b). The Commissioner may not grant a new license or authorize the extension of an existing business unless satisfied "that the applicant is qualified by character, experience, financial responsibility and equipment to properly conduct the proposed business" (Section 258-c). Nor may he do so unless also satisfied "that the issuance of of the license will not tend to a destructive competition in a market already adequately served, and that the issuance of the license will be in the public interest" (Section 258-d). In addition the Commissioner is authorized to refuse to grant or renew a license, and to suspend or revoke a license already granted, if satisfied that the applicant has failed to meet other conditions designed to insure his

responsibility, honesty and compliance with the law (Section 258-c, subparagraphs (a) to (n), inclusive).

The petitioner is, and for some years has been, duly licensed by the Commissioner to purchase milk from producers at its three New York plants, at Eagle Bridge, Salem and Norfolk (R. 4, 14, 20, 85, 111). On January 30, 1946, it applied for an extension of its license to permit it to purchase milk from producers at an additional plant, formerly operated by another dealer, at Greenwich, New York (Ex. 4, R. 86). A hearing on the application was held on March 25, 1946 (R. 21-77; Ex. 1, R. 77). The petitioner had also applied, on March 1, 1946, for a renewal of its existing license (Ex. 5, R. 86) and it was stipulated at the hearing that all evidence received should be considered in connection with both applications (R. 23).

At the hearing, milk dealers competing with the petitioner in the vicinity of Greenwich strenuously opposed any extension which would permit the petitioner to buy and receive milk at Greenwich.¹ They complained that the petitioner was not subject to the same health regulations applicable to dealers selling in New York State (R. 43-44, 62, 64-65, 70-71), that OPA ceiling prices favored the petitioner and dealers selling in the metropolitan New York market (R. 53-54, 70, 75), and suggested that the Federal Milk Order applicable to the Boston marketing area gave the petitioner a competitive advantage (R. 34-35, 65). Evidence was introduced as to a temporary short-

¹They included the Borden Company, Dairymen's League, Sheffield Farms, Middletown Milk & Cream Company, Vermont Milk & Cream Company, Washington and Rensselaer County Co-operative Association, Gold Medal Farms, Inc., and General Ice Cream Company (R. 21-22).

age of supply in the Troy market during the fall and winter of 1945-46 (R. 52, 61, 72). It was strongly urged that the petitioner should not be allowed to purchase additional supplies of milk or take on producers delivering to other dealers (R. 56, 60-61, 62, 72, 74-75).

After hearing, the Commissioner denied the application for an extension of the license to permit purchases at Greenwich, and simultaneously renewed the petitioner's license so far as its existing business in New York was concerned (R. 8-9). As required by the statute, he filed a memorandum of his decision (R. 17) setting out his findings of fact and his conclusion thereon (R. 9-13).

He found, and the evidence established, that the business which the petitioner proposed to conduct at Greenwich, like its business at its other plants in New York, would consist merely of purchasing milk and shipping it in fluid form, without processing, directly to Boston, Massachusetts (R. 10, Findings 6, 11 and 12; R. 24-25). He further found that the petitioner had had difficulty in complying with the requirements of the Board of Health of Boston, Massachusetts (in which city the milk was sold) with respect to cooling milk before shipment because of the inability of its existing plants to handle the volume of milk delivered to them (R. 10, Finding 8); that it proposed to divert to the plant at Greenwich some milk deliveries from producers living in that vicinity who were currently delivering to its plants at Eagle Bridge and Salem (R. 10, Finding 13; R. 12); that such producers would save hauling expense by making deliveries to the new plant (R. 11, Finding 17); and that the petitioner intended to "take on 20 or 30 new producers" at Greenwich in addition to those who might shift from its plants at Eagle Bridge and Salem (R. 11, Finding 16; R. 12).

The Commissioner concluded that if producers currently delivering to competing dealers in the vicinity should shift to the petitioner's new plant, it would tend to reduce the volume of milk handled by such dealers and thus to increase their costs (R. 12). Further, if such a shift occurred, it would tend to deprive local markets such as Troy, of supplies needed during the short season (R. 12). For these reasons, he determined that the extension "would tend to a destructive competition in a market already adequately served and would not be in the public interest" (R. 13), and, therefore, denied the extension (R. 8-9, 13).

In proceedings to review the Commissioner's denial of the extension, the Appellate Division of the Supreme Court of New York sustained his determination (R. 101-103). On appeal, the Court of Appeals affirmed (R. 107), holding that, on the basis of the Commissioner's conclusion that "petitioner's proposed new branch would have a tendency to draw customers and milk away from local markets, and set up undesirable competition between petitioner and other dealers" (R. 114), his refusal to extend petitioner's license was a permissible regulation of interstate commerce, and that there was no conflict between the Commissioner's order and federal regulation of interstate commerce in milk (R. 115).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that a state may deny a license to purchase milk in interstate commerce and ship it out-of-state on the ground that such purchases and shipment would tend to increase the costs of competing dealers and to divert milk from local markets.

2. In holding that denial on such grounds of a license to purchase milk in interstate commerce and ship it out-of-state is not a violation of the Commerce Clause of the Constitution of the United States (Article I, Section 8, Clause 3).

3. In holding that an order denying a license to purchase milk in interstate commerce and ship it out-of-state on the ground that such purchases and shipment would tend to increase the costs of competing dealers and to divert milk from local markets does not conflict with the Agricultural Marketing Agreement Act and Federal Milk Order No. 4, as amended.

4. In holding that such an order is not a violation of the Commerce Clause of the Constitution of the United States (Article I, Section 8, Clause 3) because in conflict with federal laws regulating interstate commerce in milk.

5. In holding that the findings and evidence on which the order of the Commissioner of Agriculture and Markets was based warranted denial of a license to purchase milk in interstate commerce and ship it out-of-state.

6. In sustaining the order of the Commissioner of Agriculture and Markets denying the petitioner's application for an extension of its license.

SUMMARY OF ARGUMENT

I. The license which the petitioner has been denied is a license to engage in interstate commerce. The petitioner's only activity at Greenwich will be that of buying milk for immediate and direct shipment out of the state. Such purchasing constitutes interstate commerce.

The petitioner has satisfied the requirements of the New York statute as to financial responsibility and good character, and has paid the required license fee and furnished the required bond. The Commissioner renewed its license to continue its business at its present locations. He denied it the right to make interstate purchases at Greenwich, not because of the character of its business, but because that market is "already adequately served" and local supplies are short. The avowed purpose and practical effect of his order is to prevent the petitioner's obtaining milk from farmers not now selling to it. Thus it limits the amount of milk the petitioner can buy for out-of-state shipment. The order does not merely regulate the conditions under which interstate commerce can be carried on. It restricts the quantity of that commerce.

It is no answer to say that interstate commerce is not restricted because the petitioner is legally free to buy all the milk it wants at its other plants in the state. Since farmers pay the cost of hauling milk to the dealer's receiving station, the location of the station with relation to the farms is a vital factor governing a dealer's ability to get milk. Legal freedom to buy unlimited quantities of milk at one location is not the practical equivalent of the right to buy it at two. That was the assumption upon which the Commissioner denied the license. The express purpose of that denial was to preclude the petitioner's "taking on" producers in the Greenwich area currently delivering to other dealers. He cannot now say that he prevented such diversion of milk to protect local dealers and consumers, and at the same time assert that petitioner's interstate trade is not in fact restricted.

II. The marketing of fluid milk is a matter of substantial national concern. Because of its

multi-state character, milk marketing can be effectively regulated only by a single national authority. The Agricultural Marketing Agreement Act and the federal milk orders issued under it provide such regulation. That regulation was designed to remove the restrictions on interstate trade in milk which resulted from excessive competition and seasonal variations in production.

Obstructions to interstate marketing of milk would vitally affect the supply of both New York and Massachusetts. About one third of New York's own supply is derived from other states. The Boston market is even more dependent on outside sources. About 90% of its supply comes from states other than Massachusetts and almost 10% is now furnished by the State of New York.

Against this national interest in preserving unimpeded interstate marketing of milk, the Commissioner asserts the interest of local dealers in freedom from competition and of local consumers in maintaining the supply for their own use. In concluding that to permit the petitioner to purchase at Greenwich would "tend to a destructive competition in a market already adequately served", he reasoned that the petitioner might divert some milk from competing dealers in the area, which, by reducing their volume, might increase their costs. Any increase in costs, he assumed, might destroy their ability to compete. In short, if a market is once "adequately served", all newcomers must be excluded since they may acquire part of the supply and thus may affect the costs to dealers already in the field. The basic philosophy behind the Commissioner's conclusion is that the milk business in each area is to be frozen for the benefit of dealers already doing business there.

Whatever may be the state's power, so far as purely intrastate trade is concerned, to confer a

monopoly on those already in business, it cannot restrain interstate commerce for the purpose of protecting existing business, whether local or interstate, from competition. Such suppression or limitation of the normal consequences of commerce among the states is forbidden by the commerce clause.

The Commissioner's order derives no additional support from his finding that the supply of fluid milk was inadequate in some local markets during the fall and winter of 1945-1946. Similar seasonal deficiencies in supply have existed in eastern metropolitan markets since 1943 and federal authorities have taken action to deal with that problem. It is settled that a state is powerless to restrain interstate commerce in lawful articles of trade on the ground that they are needed by the people of the state.

III. The Commissioner's order conflicts with the objectives of the Agricultural Marketing Agreement Act and orders issued thereunder regulating the handling of milk in interstate commerce. The basic purpose of the Act was to foster and encourage interstate commerce in agricultural commodities. In the case of milk, this purpose is achieved through the issuance of orders by the Secretary of Agriculture fixing and equalizing the prices to be paid producers. The Act expressly prohibits any limitation on the amount of milk that can be purchased or sold in interstate commerce. The Secretary has issued orders under the Act, one of which, Order No. 4, regulates the prices to be paid producers by handlers selling in the Boston, Massachusetts, market. That order governs all petitioner's purchases in New York and elsewhere. By restricting the amount of milk that the petitioner can buy and limiting the producers

from whom it may obtain milk, the Commissioner's order accomplishes what federal regulation seeks to prevent. It hampers the operations of federal milk orders and frustrates the federal policy of encouraging interstate milk marketing.

ARGUMENT

I

INTERSTATE COMMERCE IN MILK IS RESTRICTED BY THE ORDER IN QUESTION

A. THE PURCHASE OF MILK FOR OUT-OF-STATE SHIPMENT CONSTITUTES INTERSTATE COMMERCE

As the court below said (R. 113): "Petitioner's whole business, present and proposed, is interstate commerce." The license which has been denied is a license to make interstate purchases of milk. The findings of the Commissioner, and the uncontradicted evidence before him, establish that the petitioner's only activity at Greenwich will be that of buying milk from farmers for direct shipment out of the state. Immediately upon its receipt at that plant from producers, the milk will be weighed, tested, cooled and shipped in tank cars or tank trucks to Boston, Massachusetts (Finding 11, R. 10; R. 24; R. 25). No milk will be manufactured or otherwise processed at Greenwich (Finding 12, R. 10; R. 24; R. 25). All milk purchased will be shipped directly for sale in the Boston market (R. 24; R. 25). The petitioner sells no milk in New York (R. 88, Ex. 5, p. 2, items 15, 15a) and does not seek a license to sell within the state.

Purchasing milk for shipment and sale outside the state is not a local activity. It constitutes interstate commerce. *United States v. Rock Royal Co-operative, Inc.*, 307 U. S. 533, 568; *Currin v.*

Wallace, 306 U. S. 1, 10; *Interstate Natural Gas Co. v. Federal Power Commission*, 331 U. S. 682, 687-88; *Flanagan v. Federal Coal Co.*, 267 U. S. 222, 225; *Shafer v. Farmers Grain Company*, 268 U. S. 189, 198; *Lemke v. Farmers Grain Co.*, 258 U. S. 50; *Dahnke-Walker Milling Co. v. Bowdurant*, 257 U. S. 282, 290-291.

“Where goods are purchased in one State for transportation to another the commerce includes the purchase quite as much as it does the transportation.” *Currin v. Wallace*, 306 U. S. 1, 10.

Purchases of milk similar to those of the petitioner were held in *United States v. Rock Royal Co-operative, Inc.*, 307 U. S. 533, to be interstate commerce. It was there argued that sales by dairy farmers at a country plant in New York to a milk dealer who resold in interstate commerce were local transactions, completed before interstate commerce began. This Court rejected the argument, saying (at p. 568):

“But where commodities are bought for use beyond state lines, the sale is a part of interstate commerce.”

Cf. Milk Control Board v. Eisenberg Farm Products, 306 U. S. 346, 350.

B. THE ORDER LIMITS, AND IS INTENDED TO LIMIT, THE AMOUNT OF INTERSTATE COMMERCE

We do not contend that, because the petitioner's business is wholly interstate, it is immune from all the requirements of the New York licensing statute (Sections 257-258j, Article 21, Agriculture and Markets Law, Appendix, *infra*, pp. 46 to 52). We recognize that a state may require interstate purchasers of milk to be licensed and

bonded in order to prevent fraud and to insure financial responsibility and honest dealing. *Robertson v. California*, 328 U. S. 440; *California v. Thompson*, 313 U. S. 309; *Milk Control Board v. Eisenberg Farm Products*, 306 U. S. 346. The provisions of the New York statute directed to that end have been complied with. The petitioner filed the required surety bond in the amount of \$40,000 (Ex. 5, p. 1, item 9), and paid a license fee of \$1,645 (Ex. 5, p. 4, item 26). The Commissioner was satisfied that the petitioner met all the statutory requirements as to financial responsibility, good character and ability to carry on its business properly. (See Sections 258c (a) to (n), Article 21, Agriculture and Markets Law, Appendix, *infra*, pp. 49 to 51). In the very order in which he denied a license to engage in interstate purchasing at Greenwich, he renewed the petitioner's license to continue its existing business at its other plants in New York (R. 13, 19-20).

The present case thus differs from those in which this Court has sustained state statutes requiring a license to engage in interstate commerce. There the broad issue was whether the state had power to impose any licensing requirements on the activities in question. In *Robertson v. California*, 328 U. S. 440, 446-47, for example, the Court said:

“Appellant has not sought to obtain a license under the Code provisions, has not been denied one, and has not attacked any particular requirement. His charge is wholesale, not particular.”

Wholesale also was the attack in *California v. Thompson*, 313 U. S. 309; *Union Brokerage Co. v. Jensen*, 322 U. S. 202; *Duckworth v. Arkansas*, 314 U. S. 390; *Milk Control Board v. Eisenberg*

Farm Products, 306 U. S. 346; and *Hartford Accident & Indemnity Co. v. Illinois*, 298 U. S. 155. Here the issue is a narrower one. The petitioner applied for and was refused a license on specified grounds. It is the validity of that denial which is alone in question.

By barring the petitioner from making interstate purchases at Greenwich, the Commissioner's order obstructs interstate commerce in milk. Quite different was the situation in *Milk Control Board v. Eisenberg Farm Products*, 306 U. S. 346, where under the statute in question milk dealers were free to conduct interstate business in any locality in the state upon filing the required bond and paying farmers the minimum price fixed by the Board. As this Court pointed out (at p. 352): "The Commonwealth does not essay to regulate or restrain the shipment of respondent's milk to New York." Just such restraint, however, is the result of the order here. The distinction is plain between regulating the conditions under which interstate purchases may be made and restricting the right to make them. The petitioner does not have the remedy here of making such purchases if it complies with the state's regulatory conditions (Cf. *Robertson v. California*, 328 U. S. 440, 460; *Milk Control Board v. Eisenberg Farm Products*, 306 U. S. 346). It is excluded from the Greenwich market, not because of the nature of its business or the manner in which it is conducted, but because that market is "already adequately served" and local supplies have been short.

There is no merit in the suggestion of the court below that there is in fact no restriction of interstate commerce because "Petitioner, under its present, unenlarged license, may still buy, at its Eagle Bridge, Salem and Norfolk locations, as much milk

as it can get, and may send it where it will" (R. 114). This is to say, in effect, that if interstate trade is permitted in one or more localities within a state, barring it from other localities does not restrict it. If a state could thus circumscribe the area in which interstate commerce may be conducted, it would have an easy means of preventing out-of-state competition. By licensing interstate operations in localities where it would be impracticable or uneconomical to carry them on, the state could effectively block the flow of commerce.

The fallacy of that suggestion is demonstrated in the petitioner's case. The Commissioner found that the petitioner has experienced difficulty in handling milk at its Eagle Bridge and Salem plants because the volume received was too great to permit its being cooled in conformity with the requirements of the Boston Board of Health (R. 10). There was testimony that as a result milk had been rejected by that Board (R. 24-25). That was the primary reason the petitioner sought the license in question (R. 24-25; R. 86, Ex. 4). The petitioner's plant at Norfolk is, as the opinion below points out, "in another part of New York state, and serves a different area and a different group of milk producers" (R. 111). Freedom to buy "all the milk it can get" at its existing plants does not meet the petitioner's need to receive and ship milk at Greenwich.

Moreover, as a practical matter, the Commissioner's order effectively limits the total amount of milk which the petitioner can buy and ship in interstate commerce. Milk is delivered by farmers at the country station and they pay the trucking cost of hauling the milk from their farms to the plant (R. 43, 67). A reduction in the hauling dis-

tance saves the farmer trucking costs and tends to attract his business. Thus the amount of milk which a dealer can get turns on the geographical location of his plant. A geographical disadvantage may perhaps be offset if the dealer himself pays the trucking expense or equivalent subsidies (Cf. R. 67-8). But that, of course, increases his costs. Plainly, legal freedom to buy unlimited quantities of milk at one location is not the practical equivalent of the right to buy milk at two. By refusing to permit the petitioner to receive milk at Greenwich the Commissioner has in fact restricted the amount of the petitioner's interstate purchases. Such, of course, is the avowed purpose of the order. It was precisely because at Greenwich the petitioner might be able "to secure 20 or 30 additional producers who are not now delivering to any of their plants" (R. 12) that the license was denied.

If, as the court below suggests, the order imposes no practical obstacle to the petitioner's interstate purchasing, it serves no purpose whatsoever. The very basis for the order was that protection of local dealers and consumers made it necessary to prevent diversion to the petitioner of milk from the Greenwich area. If such diversion is not prevented, then local interests are not protected and the very purpose of the order completely disappears. Plainly the state cannot have it both ways: that local conditions make it necessary to limit the petitioner's interstate purchases at Greenwich, and yet that petitioner's interstate trade is in fact not at all restricted.

THE RESTRICTION IMPOSED BY THE ORDER IN QUESTION UNCONSTITUTIONALLY OBSTRUCTS INTER-STATE COMMERCE

As in all cases involving the validity of state regulation of commerce, the ultimate issue here is "whether the relative weights of the state and national interests involved are such as to make inapplicable the rule, generally observed, that the free flow of interstate commerce and its freedom from local restraints in matters requiring uniformity of regulation are interests safeguarded by the commerce clause from state interference" (*Southern Pacific Co. v. Arizona*, 325 U. S. 761, 769).

The validity of state regulation is to be tested by ascertaining whether the subject matter regulated is one "which because of its local character and the practical difficulties involved may never be adequately dealt with by Congress" and whether the type of control imposed may exist "without substantially impairing the national interest in the regulation of commerce by a single authority and without materially obstructing the free flow of commerce". *Parker v. Brown*, 317 U. S. 341, 362-363. See *California v. Thompson*, 313 U. S. 109, 113; *Duckworth v. Arkansas*, 314 U. S. 390, 394; *South Carolina State Highway Department v. Barnwell Brothers, Inc.*, 303 U. S. 177, 184-185. Or, as was said in *Southern Pacific Co. v. Arizona*, 325 U. S. 761, 767:

"When the regulation of matters of local concern is local in character and effect, and its impact on the national commerce does not seriously interfere with its operation, and

the consequent incentive to deal with them nationally is slight, such regulation has been generally held to be within state authority."

Applying this criterion, the Commissioner's order must be condemned. The problems of competition and supply in the milk industry, with which the order deals, are matters of substantial national concern, which required and have received regulation by federal authority. A restriction on purchases of milk in New York has repercussions beyond that state and affects the supply needed in Massachusetts and other states. The interest of local dealers in freedom from competition and of local consumers in maintenance of the supply do not justify the impediment which the order places on the flow of commerce.

A. THE MARKETING OF FLUID MILK IS A MATTER OF NATIONAL, NOT PREDOMINANTLY LOCAL, CONCERN

The marketing of fluid milk is essentially a multi-state activity. New York's own experience in attempting to deal with the milk problem in economic isolation demonstrated the interstate nature of the industry and the need for regulation by a single authority. The efforts of that state to stabilize the milk business within its own borders failed because it was powerless to control out-of-state competition. *Baldwin v. Seelig*, 294 U. S. 511.

²See *Report of Joint Legislative Committee to Investigate the Milk Control Law*, N. Y. Legislative Doc. (1937) No. 81, p. 15:

"The influx of interstate milk into the metropolitan area has increased from 30 per cent until it approximates at least 40 per cent of the fluid market. This has been the primary cause in the breakdown of the Milk Control Law. The State of New York is attempting to control prices in a market where it has control over the price of only 60 per cent of the product supplying the market."

The ineffectiveness of regulation by competing states led to increasing demands for federal control and resulted in the Agricultural Adjustment Act of 1935 (49 Stat. 750), reenacted and amended by the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246; 7 U.S.C. §§ 60, *et seq.*), authorizing the Secretary of Agriculture to issue orders with respect to such handling of milk as is in the current of, or directly burdens, obstructs or affects, interstate or foreign commerce.

Under the Agricultural Marketing Agreement Act, the Secretary of Agriculture has issued, and there were in effect during 1947, marketing agreements and orders regulating the handling of milk in 31 metropolitan markets (See U. S. Dept. of Agriculture, Report of the Administrator of the Production and Marketing Administration, 1947, p. 38). One of these, Federal Milk Order No. 4, as amended, regulating the handling of milk in the Greater Boston market, governs petitioner's purchases from farmers in New York (R. 30-31, 40-41). Another, Federal Milk Order No. 27, as amended, regulates handling in the New York Metropolitan Area.

The free flow of interstate commerce in milk is of vital importance to the markets in New York and to those in Massachusetts. In *United States v. Rock Royal Co-operative, Inc.*, 307 U. S. 533, 550, this Court noted that "the marketing of fluid milk in New York has contacts at least with the entire national dairy industry". Obstruction of interstate trade in milk would affect about a third of

New York's supply.³ The Boston, Massachusetts, market is even more dependent on out-of-state milk. From 1920 to 1936 about 90% of its fluid milk supply originated in states other than Massachusetts.⁴ For the last ten years that percentage has remained about the same.⁵

³From 1927-1936, from 20% to 40% of the total supply of the New York market came from out-of-state sources. See N. Y. Dept. of Agriculture and Markets, *Agricultural Bulletin 313, Statistics Relative to the Dairy Industry in New York State 1935-1936*, pp. 34-35. For the last five years the out-of-state supply has averaged about 28% as is shown by the following table compiled from U. S. Dept. of Agriculture, *Dairy and Poultry Market Statistics*, annual summaries/1943 to 1947 inclusive:

Year	Total Receipts (40-quart Units)	New York	Other States	
			Volume	%
1943	42,141,019	30,418,199	11,712,820	28
1944	43,410,310	30,857,862	12,552,448	29
1945	44,411,451	31,662,302	12,749,149	29
1946	46,605,451	33,910,498	12,694,953	27
1947	46,493,794	32,996,180	13,497,614	29

⁴See U. S. Dept. of Agriculture, Circular No. 16, *Some Economic Aspects of the Marketing of Milk and Cream in New England*, p. 9, Table 1; Transcript of Record in this Court in *H. P. Hood & Sons, Inc. v. United States*, October Term 1938, No. 772, Vol. II, p. 78.

⁵The following table, compiled from U. S. Dept. of Agriculture, *Dairy and Poultry Market Statistics*, annual summaries from 1937-1947 inclusive, shows the total volume of receipts of fluid milk at Boston, Massachusetts, from 1937 to 1947 together with the proportion of such receipts coming from Massachusetts, New York and other states:

Year	Total Receipts (40-quart Units)	Massachusetts		New York		Other States	
		Volume	%	Volume	%	Volume	%
1937	5,622,995	764,019	13	403,857	7	4,455,119	80
1938	5,713,975	812,332	14	390,851	7	4,510,792	79
1939	5,848,994	916,126	16	470,945	8	4,461,953	76
1940	6,107,860	942,571	15	556,437	9	4,608,852	76
1941	6,430,226	898,256	14	575,735	9	4,956,235	77
1942	7,161,182	939,194	13	645,697	9	5,606,291	78
1943	7,845,855	803,850	10	641,976	8	6,400,029	82
1944	8,286,933	629,766	8	772,824	9	6,884,344	83
1945	8,980,583	516,255	6	688,397	7	7,775,931	88
1946	9,261,954	443,029	5	699,991	7	8,127,934	88
1947	8,919,355	424,276	5	959,630	10	7,526,449	85

The State of New York is the third largest milk producing state in the nation (see U. S. Dept. of Agriculture, *Agricultural Statistics* 1946, p. 376, Table 489). Milk from that state has for years furnished and continues to furnish, an appreciable portion of Boston's out-of-state supply. Traditionally that state, and the very area in which the petitioner has been denied a license to make interstate purchases, has been a source of Boston milk. As the testimony before the Commissioner showed, that territory was developed as the Boston milk shed (R. 38); the petitioner has bought milk there since about 1900 (R. 36); and for some twenty years the Whiting Company also shipped milk from that territory to Boston (R. 38, 44, 49).⁶

In the 1920's, New York milk constituted from 16% to 20% of milk receipts in Boston (see U. S. Dept. of Agriculture, Circular No. 16, *Some Economic Aspects of the Marketing of Milk and Cream in New England*, p. 9, Table 1). In the 1930's, New York's contribution averaged about 7% of the total receipts, the drop being in part due to the aggressive competition of New York dealers. (R. 49). During the last ten years, 8% to 10% of milk receipts at Boston were of New York origin, and

⁶The extension of the Boston market into eastern New York from 1900 on is shown in the U. S. Dept. of Agriculture, Circular No. 16, *Some Economic Aspects of the Marketing of Milk and Cream in New England*, pp. 7-9. See also the Master's report in the Transcript of Record in this Court in *H. P. Hood & Sons, Inc. v. United States*, October Term 1938, No. 772, Vol. II, pp. 76-78.

⁷See Transcript of Record in this Court in *H. P. Hood & Sons, Inc. v. United States*, October Term 1938, No. 772, Vol. II, p. 78.

that proportion has been growing.⁸ Of the total volume of milk handled under Federal Milk Order No. 4, as amended, milk from New York rose from 4% to 8% during the 1940-1947 period.⁹ The number of New York farmers from whom milk is purchased under that Order has increased correspondingly.¹⁰

New York not only furnishes an appreciable portion of the Boston supply, but serves the needs of the interstate New York-New Jersey metro-

⁸See Table, footnote 5, *supra* p. 20.

⁹See *Boston Milk Market Statistics, August 1937-December 1947*, released by Richard D. Aplin, Market Administrator of Order No. 4 (October 1948) p. 24.

TABLE 41. ANNUAL RECEIPTS OF MILK FROM PRODUCERS AND PRODUCER-HANDLERS, BY STATES (IN MILLIONS OF POUNDS)

	Massachusetts	Maine	New Hampshire	Vermont	New York	All States
1940	150.0	133.1	108.4	733.6	47.5	1,172.6
1941	149.5	137.9	105.4	780.4	49.3	1,222.5
1942	136.6	135.7	96.1	816.4	53.0	1,237.8
1943	112.8	124.2	98.6	846.3	55.1	1,237.0
1944	97.0	143.1	104.5	919.5	74.2	1,338.3
1945	85.0	141.5	101.8	964.9	82.4	1,375.6
1946	78.7	115.3	82.0	881.8	78.6	1,236.4
1947	78.2	137.2	82.9	937.8	111.9	1,348.0

¹⁰See *Boston Milk Market Statistics August 1937-December 1947*, released by Richard D. Aplin, Market Administrator of Order No. 4 (October 1948) p. 22, Table 29. A summary of that table follows:

TABLE 29. NUMBER OF PRODUCERS IN NEW YORK

	Average	% of Total
1940	577	3.7
1941	609	4.1
1942	604	4.2
1943	617	4.5
1944	755	5.4
1945	808	5.9
1946	827	6.7
1947	1,090	8.4

politan market.¹² Impediments on the purchase of milk in New York for out-of-state shipment can materially affect the fluid supply of important eastern cities. Similar impediments by other states would seriously prejudice New York's own supply. Local obstructions to interstate trade in milk do not have a merely local effect. They necessarily extend across state borders and reach consumers in other areas.

B. THE LOCAL INTERESTS WHICH THE COMMISSIONER SEEKS TO PROTECT DO NOT JUSTIFY THE OBSTRUCTION TO INTERSTATE COMMERCE

There is no claim that the petitioner's activities are inherently harmful or that there is need to prevent or restrict them in order to protect New York citizens from fraudulent or irresponsible dealings. *Cf. Robertson v. California*, 328 U. S.

¹²See N. Y. Dept. of Agriculture and Markets, Agricultural Bulletin 313, *Statistics Relative to the Dairy Industry in New York State*, 1935-1936, p. 34.

"The New York Metropolitan market embraces large populations in both New York and New Jersey. Reasonably accurate records of receipts of milk and cream at that combined market, segregated by state of origin, have been available since 1927. Data are not available separately as to the total consumption in the parts of this market located respectively in New York and New Jersey. In 1927, New York State supplied 78.8 per cent of the milk received at that market. During succeeding years, the percentage from this state declined rapidly, dropping from 78.8 per cent in 1927 to 69.4 in 1932 and 63.1 per cent in 1936. In 1936, the proportion had risen to 63.4 per cent of a total."

See also Bulletin 339 (1938-41), p. 18 and Table 186; Bulletin 357 (1942-44) Tables 124, 128, 129, 130; U. S. Dept. of Agriculture and N. Y. Dept. of Agriculture and Markets, *Statistics Relative to the Dairy Industry in New York State*, 1947, Table 22.

440; *California v. Thompson*, 313 U. S. 309. The avowed purpose of the order is quite different. It is to confer an economic benefit on local dealers and consumers by protecting them from the normal consequences of interstate competition. The order rests on two grounds: First, if the petitioner takes business from producers now selling to competing dealers, it will "tend to a destructive competition in a market already adequately served" (R. 12-13), and second, if the petitioner buys milk from producers now delivering to local markets, it will tend to deprive those markets of a needed supply (R. 12). Neither of these grounds justifies restricting interstate commerce in milk.

1. *Interstate commerce cannot be curtailed in order to protect local businesses from competition.*

There is no need to speculate as to what the New York statute means by a tendency to "destructive competition in a market already adequately served" (Section 258-c, Article 21, Agriculture and Markets Law, Appendix, *infra*, p. 49). As applied in this case, it means that when the Commissioner finds that there are enough dealers in the market all newcomers are to be excluded for the benefit of those already in the field. The findings and conclusion of the Commissioner make that clear.

The record showed that the Greenwich plant will have capacity to handle about 800 forty-quart cans daily (R. 28, 30). The petitioner proposed to have 300 to 500 cans a day delivered to that plant by producers who are currently delivering to its Eagle Bridge and Salem stations (R. 10, Finding 13; R. 42). The Commissioner did not suggest that the shift of these producers to Greenwich will have

any effect, destructive or otherwise, upon the competitive situation in the market. Whether producers now selling to the petitioner make deliveries at one or another of its stations is plainly immaterial to the petitioner's competitors. The Commissioner found, however, that the petitioner "intends to take on 20 or 30 new producers at the Greenwich plant" (R. 11, 12). Their total deliveries would amount to a maximum of 150 cans a day (R. 27). Because of the possibility that the milk of these producers might be diverted from competing dealers to the petitioner, the Commissioner determined that purchases by the petitioner at Greenwich would tend to destroy competition.

That conclusion he reached by the following chain of reasoning: There are three plants in the area operated by competing dealers and these plants can handle "more" milk (R. 11, Findings 18-19; R. 12). A shift to the petitioner of 20 or 30 producers "will tend to reduce the volume of milk received at the plants which lose those producers" (R. 12). Such a reduction in volume "will tend to increase the cost of handling milk in those plants" (R. 12). (This step the Commissioner bases upon statements, of which he took judicial notice, in a report of the New York State Temporary Commission on Agriculture (Feb. 1946) and in Bulletin 473 of the Cornell University Experiment Station (R. 12) to the effect that "one of the factors" or "the most important factor" in the cost of operating a country plant is the volume of milk handled.) Finally, he asserts, any increase in competing dealers' costs will tend to destroy competition. In short, if the dealers already doing business in an area can handle all the milk produced there, any additional competition may reduce the volume of

milk they receive and thus necessarily tends to be destructive. Therefore, all newcomers must be excluded.

This reasoning is plainly "speculative and tenuous".¹² Beyond the naked assertion that any reduction in volume may result in increased costs, and that any increase in costs tends to be destructive of competition, the record does not show how the petitioner's operations at Greenwich may destroy the ability of its competitors to carry on their businesses successfully. The record contains testimony and argumentative statements from many competing dealers, much of it directed to complaints that the provisions of the federal milk order regulating the Greater Boston market gave the petitioner a competitive advantage (R. 34-5, 65), that OPA ceiling prices favored the petitioner and dealers who sold to the New York Metropolitan market (R. 53-54, 70, 75), and that the petitioner was not subject to the same health regulations applicable to dealers selling in New York state (R. 43-44, 62, 64-65; 70-71). But the record is barren of any evidence as to the actual operating costs of the three competing plants in the area, as to the extent to which the loss of 150 cans a day, or any part thereof, might increase those costs or as to the effect of increased costs on the ability of any of those dealers to compete.

¹²The Appellate Division of the Supreme Court of New York so characterized this precise line of reasoning in *Matter of Eisenstein*, 268 App. Div. 320, 323, 51 N.Y.S. (2d) 811, 814, where, as here, the Commissioner had denied a license to purchase milk for shipment and sale out of the state on the ground of a tendency to a "destructive competition". The *Eisenstein* case has never been reversed or distinguished. It is not mentioned either in the *per curiam* opinion of the Appellate Division in the present case (R. 101-103), nor in the opinion of the Court of Appeals (R. 111-115), although it was relied on by the petitioner in both courts.

The Commissioner's order is thus based on the abstract principle that any new competition tends to be destructive in a market already adequately served. It reflects a basic philosophy that the business of milk dealing should be frozen for the benefit of those currently engaged in the market.¹³ So far as purely local trade is concerned, New York may, or may not, be free to prevent the entrance of newcomers into the milk business and to restrict the market to those already in the field. *Cf. Mayflower Farms, Inc. v. Ten Eyck*, 297 U. S. 266; *New State Ice Co. v. Liebman*, 285 U. S. 262. That is not the issue here. Such a policy gives rise to entirely different considerations when applied to interstate

¹³This attitude of the Department of Agriculture and Markets was referred to in the report of Robert M. Benjamin, as commissioner. See *Administrative Adjudication in the State of New York* (1942) Vol. III, pp. 37-38:

"Some applicants have suggested that the Division's decision in a given case to decline to issue a license is based upon a preconceived notion that there are already a sufficient number of milk dealers in the State and that new applicants propose to serve a market already adequately served. Observation confirms this suggestion in so far as it relates to new applicants in urban areas. . . .

The principle of limiting licenses because of the imminence of a destructive competition in a market already adequately served offends some people and the Department usually finds other grounds upon which to decide.

"During the calendar year 1939, out of 102 denials of new applications, only five were based on the sole ground that the market was already adequately served and that the new application would tend to a destructive competition. In thirty-five other cases, this ground was cited in connection with one or more other grounds. There is strong reason to believe that some of these contributory reasons for the refusal to issue a license were rationalizations of an initial decision that the market was already adequately served."

commerce. As was said in *Freeman v. Hewit*, 329 U. S. 249, 252:

“It may commend itself to a State to encourage a pastoral instead of an industrial society. That is its concern and its privilege. But to compare a State’s treatment of its local trade with the exertion of its authority against commerce in the national domain is to compare incomparables.”

The right to engage in interstate commerce cannot be curtailed in the interest of preserving existing business from out-of-state competition. A state may not thus “suppress or mitigate the consequences of competition between the states” or “neutralize the economic consequences of free trade among the states” (*Baldwin v. Seelig*, 294 U. S. 511, 522, 526).

In *Toomer v. Witsell*, 334 U. S. 385, decided at the last Term, this Court struck down South Carolina’s attempt to create a commercial monopoly for South Carolina residents in trawling for shrimp by requiring owners of shrimp boats fishing in South Carolina waters to dock at a South Carolina port and unload, pack and stamp their catch before shipping it to another state. This effort “to divert to South Carolina employment and business which might otherwise go to Georgia” and “to impose an artificial rigidity on the economic pattern of the industry” was held to be precluded by the Commerce Clause. A similar attempt by Louisiana to favor local canning and packing industries by restricting interstate commerce in raw or unshelled shrimp was invalidated in *Foster-Fountain Packing Co. v. Haydel*, 278 U. S. 1. Cf. *Hale v. Binco Trading, Inc.*, 306 U. S. 375.

Nor may interstate commerce be excluded because existing businesses are able to serve the needs of a community adequately and further competition is believed "unnecessary". *Buck v. Kykendall*, 267 U. S. 307; *George W. Bush & Sons Company v. Maloy*, 267 U. S. 317. In the *Buck* case a common carrier who sought to operate an auto stage line for the carriage of passengers and freight exclusively in interstate commerce from Seattle, Washington, to Portland, Oregon, was denied a certificate by Washington authorities on the ground that the territory was already adequately served by four other lines holding certificates from the state. The Washington statute, as thus applied, was held to be a forbidden obstruction of interstate commerce, Mr. Justice Brandeis saying (267 U. S. at 315):

"Its primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines not the manner of use, but the persons by whom the highway may be used. It prohibits such use to some persons while permitting it to others for the same purpose and in the same manner. Moreover, it determines whether the prohibition shall be applied by resort, through state officials, to a test which is peculiarly within the province of federal action—the existence of adequate facilities for conducting interstate commerce."

Similar was the decision in the *Bush Company* case where, in refusing a certificate to an interstate carrier, the state commission had considered merely "whether or not existing lines of transportation would be benefited or prejudiced".

The Commissioner's order falls within the condemnation of these cases. Its primary purpose is to prohibit competition; it determines not how, but to what extent, interstate commerce may be conducted; it denies to the petitioner the right to purchase milk while permitting competing dealers to buy for the same purpose and in the same manner. Prejudice to existing businesses is the basis on which interstate commerce is restricted.

It will not do to say that the intended beneficiaries are New York producers, not competing milk dealers, and that competition is prevented because in the long run it may drive down prices to farmers. There is, of course, no immediate benefit to producers who are denied the saving in hauling expense which would be realized if they delivered to Greenwich rather than to more distant plants of the petitioner or other dealers (Finding 17, R. 18; R. 41, 58-59) and who must forego "a broader and a better market" resulting from additional outlets for their milk (see *Matter of Eisenstein*, 268 App. Div. 320, 323, 51 N.Y.S. (2d) 811, 814). Nor is there any basis for the argument that ultimately further dealer competition may decrease the prices producers receive. Dealers, like the petitioner, who handle milk subject to a federal order, must pay a fixed minimum. The prices of others may be fixed by the Commissioner under the New York statute (Agriculture and Markets Law, Article 21, section 258-m).

But the short answer to any contention that producers, not dealers, are the real object of the Commissioner's solicitude is found in the holding of *Baldwin v. Seelig*, 294 U. S. 511, that the economic welfare of New York's farmers cannot be promoted by suppressing or limiting the conse-

quences of interstate competition in milk. That case was, in effect, the converse of the present. New York's attempt there was to restrict the importation of milk to insure price security for its farmers. Here it limits the right to export. The interests of milk producers furnish no more justification for the latter than for the former.

Baldwin v. Seelig also gives the answer to any claim that the ultimate "end to be secured is the maintenance of a regular and adequate supply of pure and wholesome milk". To the suggestion that "the state intervenes to make its inhabitants healthy, and not to make them rich", Mr. Justice Cardozo replied (at p. 523):

"To give entrance to that excuse would be to invite a speedy end of our national solidarity. The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."

2. *Interstate commerce cannot be curtailed in order to preserve a supply of milk for local consumers*

The second ground on which the Commissioner denied the license, the possibility that local supplies might be depleted, furnishes no better support for his order. The Commissioner found that "Some Troy dealers now obtain milk in the area where applicant purchases" (R. 11, Finding 20), that "There are producers who live within 10 miles of Greenwich who now deliver their milk to

Glens Falls" (R. 11, Finding 22), and that "The supply of milk for the Troy market during the last short season of October through January [1945-6] was inadequate" (R. 11, Finding 21). On the basis of these findings, he concluded that "If applicant takes producers now delivering milk to local markets such as Troy, it will have a tendency to deprive such markets of a supply needed during the short season" (R. 12).

The evidence showed that there are about 300 producers in the portions of Washington and Rensselaer counties adjacent to Troy whose milk is delivered directly by truck to the cities of Troy and Glens Falls (R. 48, 51, 53); that during the fall and winter of 1945-46 these regular truck deliveries were "inadequate" to meet the demand of the Troy market for milk and cream (R. 51-52); and that some milk was diverted to that area from country stations which normally sold their milk elsewhere (R. 52-53). There was further testimony that the regular supply of milk of Troy, Glens Falls and Schenectady was about 90% of the demand during the 1945-46 short season (R. 60-61, 72).

This seasonal deficiency in fluid milk in 1945-46 was not a local condition, confined to the Troy area. It extended not only throughout much of the State of New York (R. 74), but was extreme in Boston, Massachusetts, and was felt in other Eastern markets (R. 34, 61). In fact, the same condition has prevailed in all Eastern metropolitan markets during the "short season" for the past four or five

¹⁴Most metropolitan markets cannot be supplied with milk by direct truck delivery even in the flush season. See, *e. g.*, the finding with respect to the Fall River, Massachusetts, marketing area, 13 F. R. 3871.

years. The Secretary of Agriculture has repeatedly pointed out that since 1943 the Boston market has been inadequately supplied with fluid milk during the winter months.¹⁵ Because of that insufficiency of supply, the Market Administrator under Federal Milk Order No. 4, as amended, has twice declared an emergency in the Boston market.¹⁶ Similar seasonal shortages have existed during recent years in the Philadelphia market.¹⁷

The recurrent shortages of supply for Eastern markets during the winter months in the last few years are not due to any overall deficiency in milk production in New York, or elsewhere. In 1945, the year of the greatest winter shortage in the East, the annual production of milk in New York reached the highest point in twenty-five years (see U. S. Dept. Agriculture, *Statistics Relative to the Dairy Industry in New York, 1945*, p. 3), a record which was even increased in 1947 (U. S. Dept. Agriculture, *Statistics Relative to the Dairy Industry in*

¹⁵See Decision With Respect to Proposed Marketing Agreement, Greater Boston, Massachusetts, Marketing Area, March 18, 1948, 13 F. R. 1520, 1522:

"During the four years 1943 through 1946 shortages of milk in the marketing area have occurred each fall."

See also Decision, Greater Boston, Massachusetts, Marketing Area, June 30, 1947, 12 F. R. 4402; Notice of Report, April 4, 1946, 11 F. R. 3607, 3611.

¹⁶Declaration of emergency, October 11, 1946 (11 F. R. 1221), terminated January 20, 1947 (12 F. R. 489). Declaration of emergency October 29, 1947 (12 F. R. 7048), terminated March 4, 1948 (13 F. R. 1261). See also *Boston Milk Market Statistics, August 1937-December 1947*, released by Richard D. Aplin, Market Administrator of Order No. 4, pp. 11-12.

¹⁷See Decision, Philadelphia, Pennsylvania, Marketing Area, July 9, 1948, 13 F. R. 3971.

New York, 1947, p. 3): These shortages stem from the fact that milk production is highly seasonal, and that for the past ten years in all markets the divergence between milk receipts in the period of highest production in the spring and the low point in the fall has been increasing.¹⁸ As the Secretary of Agriculture stated in a recent decision:

"The total annual volume of milk produced for the New York market, and in the Northeast generally, is more than adequate to meet requirements for fluid milk and cream. Extreme seasonal variation in production, however, results in excessive supplies at one season and shortages at another season." (Decision, New York Metropolitan Marketing Area, July 23, 1948, 13 F. R. 4322, 4323.)

To remedy these seasonal deficiencies in supply, the Secretary has adopted measures to encourage the flow of milk from all sources into the Boston market during such emergency periods and to foster increased production during the short season. These measures are discussed *infra*, pp. 41 to 42. The Commissioner's order, as we there show, is in conflict with them.

If, however, deficiency of supply had been in fact peculiar to local markets in New York, and not the subject of federal regulation, the case would be no different. New York cannot restrict interstate purchases in order to preserve its milk supply, even if needed for its own inhabitants.

¹⁸See, e. g., Decision, Greater Boston, Massachusetts Marketing Area, March 18, 1948, 13 F. R. 1520, 1522; Decision, New York Metropolitan Marketing Area, July 23, 1948, 13 F. R. 4322, 4323.

Pennsylvania v. West Virginia, 262 U. S. 553; *Oklahoma v. Kansas Natural Gas Co.*, 221 U. S. 229. Cf. *Toomer v. Witsell*, 334 U. S. 385; *Foster-Fountain Packing Co. v. Haydel*, 278 U. S. 1. As was said in *Foster-Fountain Packing Co. v. Haydel*, *supra*, at 10:

“A State is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of the State.”

In *Pennsylvania v. West Virginia*, 262 U. S. 553, this Court considered the validity of a West Virginia statute prohibiting any pipe line company which obtained gas in West Virginia from transporting such gas out of the state until the needs of all consumers in the state were satisfied. It was established as a fact that the gas provided within the state was not sufficient to meet local requirements so that the diversion of any gas must leave some West Virginia consumers without such fuel (262 U. S. 553, 588, 589). This Court condemned the statute, saying (at p. 596-597):

“Natural gas is a lawful article of commerce and its transmission from one State to another for sale and consumption in the latter is interstate commerce. A state law, whether of the State where the gas is produced or that where it is to be sold, which by its necessary operation prevents, obstructs or burdens such transmission is a regulation of interstate commerce,—a prohibited interference.

“... Her [West Virginia's] present ef-

fort, rightly understood, is to subordinate that [interstate] part to the local business within her borders. In other words, it is in effect an attempt to regulate the interstate business to the advantage of the local consumers. But this she may not do."

Referring to the State's contention that since the supply of gas was wanting and insufficient to satisfy local needs the statute was a legitimate measure of correction, this Court replied (at p. 598):

"If the situation be as stated, it affords no ground for the assumption by the State of power to regulate interstate commerce, which is what the act attempts to do. That power is lodged elsewhere."

The present order is not to be distinguished on the ground that it restricts the purchase, rather than the shipment, of milk. Interstate commerce "includes the purchase quite as much as it does the transportation". *Currin v. Wallace*, 306 U. S. 1, 10. It "embraces all the component parts of commercial intercourse among States". *Foster-Fountain Packing Co. v. Haydel*, 278 U. S. 1, 10.

We submit, therefore, that the obstruction on interstate commerce which the Commissioner's effects cannot be justified on the basis of the local interests which it purports to serve.

III

THE ORDER IN QUESTION CONFLICTS WITH FEDERAL REGULATION OF THE HANDLING OF MILK

The Agricultural Marketing Agreement Act (Appendix, *infra*, pp. 52 to 59) authorizes the Sec-

retary of Agriculture to issue orders regulating the handling of certain agricultural commodities, including milk, which is in the current of, or directly burdens, obstructs or affects, interstate or foreign commerce. Declaring, in Section 1, that "the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers" and that such conditions "burden and obstruct the normal channels of interstate commerce", Congress stated its policy, in Section 2, to "establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce" as would establish the prices to farmers at the 1909-1914 level. Since a breakdown in interstate commerce in agricultural commodities was threatened by the collapse in farm prices and farmers' purchasing power, the remedy was to raise and stabilize prices to farmers. Through that mechanism, Congress sought to keep open the channels of interstate trade.

With respect to commodities other than milk, the chief obstacle to effective price stabilization was the existence of supplies in excess of consumer demand.¹⁹ Therefore, the Act provided for the issuance of orders limiting the amount of the commodity which might be marketed in interstate commerce or allotting the quantity which individual handlers could purchase from producers or sell or transport in interstate commerce (Section 8c(6)).²⁰ See *Parker v. Brown*, 317 U. S. 346, 353, 367-68.

¹⁹See H. Rep. No. 1241, p. 41, 74th Congress, 1st Session.

²⁰*Cf.* Agricultural Adjustment Act of 1938, as amended (52 Stat. 31, U. S. C. Title 7, §§1281 *et seq.*), providing for the establishment of marketing quotas for certain basic agricultural commodities; *Mulford v. Smith*, 307 U. S. 38; *Wickard v. Filburn*, 317 U. S. 111.

Quite different was the approach in the case of milk and dairy products. There the objective of the Act was to be achieved by orders fixing the prices to be paid²¹ to producers and, through equalization pools, distributing the total value of all milk sold in the market among producers supplying that market (Section 8c(5)). See *United States v. Rock Royal Co-operative, Inc.*, 307 U. S. 533; *H. P. Hood & Sons, Inc. v. United States*, 307 U. S. 588; *Stark v. Wickard*, 321 U. S. 288. No limitation on the amount of milk shipped in interstate commerce is authorized. No curtailment of the quantity of milk to be purchased by any handler is permitted. All handlers are free to purchase where and to the extent they can, subject to paying minimum prices in the manner provided in the order. Any restriction on the free flow of milk from state to state is expressly forbidden. Section 8c(5)(G) of the Act provides:

"No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States."

That provision was inserted to make it clear beyond doubt that no artificial barriers on interstate trade in milk should be interposed.²¹

In accordance with the Act, the Secretary of Agriculture has issued orders regulating the handling of milk in many metropolitan markets, among others, Order No. 4, applicable to the

²¹ See 79 Cong. Rec., 9572-9573, 13022. Cf. H. Rep. No. 1241, p. 11, 74th Congress, 1st Session.

Greater Boston, Massachusetts, market (Title 7, Code of Federal Regulations, Part 904), and Order No. 27 to the New York Metropolitan market (Title 7, Code of Federal Regulations, Part 927). These orders classify milk according to its uses and establish a minimum price for each such classification, prescribe the payment of uniform prices for all milk delivered, and set up a method for adjusting or equalizing payments as among handlers so that each will pay the full use value of the milk he purchases. They apply to all purchases made by handlers selling in the market wherever those purchases are made. Thus, Order No. 4 covers all the petitioner's purchases in New York, including the proposed purchases at Greenwich (R. 30, 40-41).

The conditions which gave rise to this regulation are spelled out in the record and the opinion of this Court in the cases of *United States v. Rock Royal Co-operative, Inc.*, 307 U. S. 533, and *H. P. Hood & Sons, Inc. v. United States*, 307 U. S. 588. Seasonality of milk production and excessive competition threatened the quality and, ultimately, the quantity of fluid milk available for consumption in metropolitan areas. The appropriate remedy for these evils was "a fair division among producers of the fluid milk market and utilization of the rest of the available supply in other dairy staples" (*United States v. Rock Royal Co-operative, Inc.*, 307 U. S. 533, 550). That was accomplished through the price fixing and equalization provisions of the Act and the orders, which were designed "to foster, protect and encourage interstate commerce by smoothing out the difficulties of the surplus and cut-throat competition which burdened this marketing." (*Ibid.*, at 572).

The order of the Commissioner, we submit, is "an obstacle to the accomplishment and execution

of the full purposes and objectives" of this regulation (*Hines v. Davidowitz*, 312 U. S. 52, 67). We do not contend that the federal scheme leaves no room for any state regulation of milk dealers. Cf., e. g., *Rice v. Sante Fe Elevator Corp.*, 331 U. S. 218; *Cloverleaf Butter Co. v. Patterson*, 315 U. S. 148. So far as the New York statute is applied "to protect the farmer from fraud arising from the peculiar conditions under which milk is produced and sold" by assuring the honesty and responsibility of dealers (*People v. Perretta*, 253 N. Y. 305, 311), we do not challenge its validity. Congress has not undertaken to insure the right of fraudulent or insolvent handlers to do business. But it has undertaken to encourage interstate marketing of milk in the interest of the nation's farmers and consumers and to free it from burdens arising out of seasonality of production and excessive competition. As applied in this case, the New York statute not only covers the very field of federal regulation, but hampers the attainment of federal objectives. In its practical administration it is directly repugnant to the federal scheme.

In denying the petitioner a license to make interstate purchases at Greenwich, the Commissioner has limited the number of producers from whom the petitioner can buy and the amount of milk it can acquire for shipment from that area. He has thus restricted the availability of a source of supply for the Boston market. The need for New York milk to make up deficiencies in the regular Boston supply has been recognized by the Secretary of Agriculture, and he has refused to modify the Boston order in a manner which would limit

the availability of milk from that source.²² The Commissioner has achieved such a limitation.

The fact that the Commissioner's order rests in ~~part~~ on the inadequacy of local supplies during the so-called "short" season of fall and winter emphasizes the conflict between his action and that of the federal authorities. As we have shown, *supra*, pp. 32 to 33, that seasonal deficiency has existed for the past few years in Boston and other eastern markets. To remedy that condition, the Secretary of Agriculture has adopted two measures: First, Order No. 4 was amended to authorize the Market Administrator under that Order to declare emergency periods during which the purchase of milk from producers not normally serving the Boston market is encouraged.²³ The definition of "emer-

²² See Notice of Report, April 4, 1946, 11 F. R. 3607, 3611, approved and adopted by the Secretary, May 29, 1946, 11 F. R. 5897. That Report states (11 F. R. 3607, 3611):

"On the basis of the record it appears that milk is imported from plants subject to the New York order very largely to make up deficiencies in the regular Boston supply. The provisions of one Federal order, insofar as possible, should not interfere with the free flow of milk which one Federally regulated market has available and which the other such market requires."

²³ 11 F. R. 5897; 12 F. R. 4402, 4405. The Order (7 C.F.R. 1945 Supp., § 904) defines "emergency period" as that period in which the Market Administrator declares that the milk supply available from producers is insufficient to meet the demand in the market for Class I (fluid) milk (§ 904.1(a)(5)), and "emergency milk" as fluid milk received from a plant which was unregulated (i.e., not under the Order) before the emergency (§ 904.1(e)(8)). Receipts of emergency milk are treated as Class I receipts (§ 904.6(f)) (see *Boston Milk Market Statistics August 1937-December 1947* released by Market Administrator under Order No. 4 (1948), p. 11-12). Except during an emergency, "outside" milk, i.e., milk from a farmer normally delivering to other markets than Boston (§ 904.1(d)(6)), is treated as Class II milk (§ 904.5(d)). When receipts of milk from outside the usual marketing area are treated as Class I, the handler of that milk receives a proportionately higher credit to his account in the equalization pool.

gency milk" in that Order is expressly designed to permit the purchase of milk from New York or any other area during an emergency.²⁴ Second, the Secretary has made a basic attack on the whole problem of seasonal deficiencies by raising the minimum prices to be paid producers in the fall and winter months in order to encourage greater milk production during that season. Provisions for such higher prices have been adopted in the orders regulating the Boston market (12 F. R. 4402, 4403; 13 F. R. 1520, 1522), the New York metropolitan market (13 F. R. 4322) and the Philadelphia market (13 F. R. 3971). In this way he has attempted to augment the available supply for all markets in accordance with the policy of the Act. The Commissioner's order reflects a contrary policy. He seeks to conserve local milk for local needs and restricts any increase in milk production from entering into interstate commerce.

The very problem of the effect of competition between dealers in the overlapping New York and Boston milksheds has been a matter of continuing concern to the Secretary. When urged from time to time to establish uniform differentials and iden-

²⁴See Decision, Greater Boston, Mass., Marketing Area, June 30, 1947, 12 F. R. 4402, 4405:

"The definitions of emergency period and emergency milk should be revised to delete any reference to the New York milkshed and make any milk outside the regular Boston supply available on an emergency basis."

See also Notice of Report, April 4, 1946, 11 F. R. 3607, 3611:

"In defining emergency milk, no geographical limits should be designated which would restrict the source of such milk, since the prime objective during an emergency is to attract milk to the market from whatever source whether it be New England or the midwest."

tity of prices in the two markets to prevent alleged competitive advantages in favor of Boston dealers, he has found that precise alignment is not feasible, and that milk has not been unduly attracted from one area to the other.²⁵ At the same time he has recognized the necessity for general coordination of the prices in the two markets to prevent significant divergence in the supply-demand relations between them (see, *e. g.*, Decision, Greater Boston, Mass., Marketing Area, March 18, 1948, 13 F. R. 1520, 1524; Decision, New York Metropolitan Marketing Area, July 27, 1948, 13 F. R. 4322, 4323).²⁶ Throughout his administration of the orders governing these markets, he has avoided imposing any artificial restriction on the normal competition between them or giving any undue advantage to one side or the other.

The Commissioner has taken an entirely contrary course. He seeks to freeze the Greenwich supply for the benefit of local dealers and local consumers. He narrows the outlets through which producers in that area can dispose of their milk and restricts their opportunity to sell in a federally regulated market. He thus accomplishes the very results which Congress sought to prevent.

It is idle for federal regulation to fix and equalize producer prices in order to raise farmers'

²⁵See, *e. g.*, Decision, New York Metropolitan Marketing Area, June 30, 1947, 12 F. R. 4413, 4415; January 28, 1948, 13 F. R. 452, 456; July 27, 1948, 13 F. R. 4322, 4323; Decision, Greater Boston, Mass., Marketing Area, March 18, 1948, 13 F. R. 1520, 1523, 1524.

²⁶As he has said (Decision, June 30, 1947, 12 F. R. 4402, 4405): "The pricing of milk under each Federal order has required the appraisal of the local conditions and the relationship of any adjacent Federal order market to the market for which prices are being established."

purchasing power and to insure the availability of milk for consumers in metropolitan markets if a state can limit interstate purchases in the interest of local dealers and consumers. By restricting the amount of milk that an interstate handler can buy, or the number of producers with whom he can deal, a state can effectively hamper the objectives and functioning of the federal milk program. Since the Commissioner's order does just that, it is invalid. *Hill v. Florida*, 325 U. S. 538. See *Hines v. Davidowitz*, 312 U. S. 52, 67; *Cloverleaf Butter Co. v. Patterson*, 315 U. S. 148, 155-56; *McDermott v. Wisconsin*, 228 U. S. 115, 131-132; *Savage v. Jones*, 225 U. S. 501, 533.

To hold in this case that a conflict exists between the Commissioner's order and the federal policy and program, it is not necessary for this Court to take a position inconsistent with its decision in *Milk Control Board v. Eisenberg Farm Products*, 306 U. S. 346, as suggested by the New York Court of Appeals (R. 115). Conflict between the state statute and federal milk regulation was not there in issue. Although, as the New York Court of Appeals has pointed out (R. 115), federal milk legislation had become effective and was called to the attention of this Court before its decision was rendered in that case, the Court expressly excluded from its decision any question of repugnancy between state and federal action. It said:

"The question for decision is whether, in the absence of federal regulation, the enforcement of the statute is prohibited by Article I, §8 of the Constitution." (Italics supplied.)

See also *United States v. Rock Royal Co-operative, Inc.*, 307 U. S. 533, 570-71.

The present case is quite unlike *Parker v. Brown*, 317 U. S. 341, which upheld the validity of a California marketing program for raisins against the contention that it conflicted with the Agricultural Marketing Agreement Act. That program restricted the amount of raisins which could be sold in California by producers to processors, who, after processing, shipped and sold the commodity in interstate commerce. There, the Secretary had not exercised his power to issue an order regulating raisins; he had reason to believe that the California program would effectuate the policy of the federal act; he had collaborated in the formulation of that program; and the program had been aided by loans from a federal agency on the Secretary's recommendation. The plan for allotting the amount of raisins to be marketed in interstate commerce coincided with the policy of Section 8c(6) of the Act which expressly provides for marketing quotas in the case of that commodity. In the present case, none of those factors are found. With respect to milk, the Act expressly prohibits any limitation on the amount that can be sold or bought. The Secretary has issued milk orders which govern the petitioner's purchases in New York. The Commissioner's order conflicts, rather than coincides, with the policy and operation of federal regulation.

CONCLUSION

The judgment of the Supreme Court for the County of Albany should be reversed.

Respectfully submitted,

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November, 1948.

APPENDIX

Article 21 of the Agriculture and Markets Law of New York:

257. *Licenses to milk dealers.* No milk dealer shall buy milk from producers or others or deal in, handle, sell or distribute milk unless such dealer be duly licensed as provided in this article. It shall be unlawful for a milk dealer to buy milk from or sell milk to a milk dealer who is unlicensed, or in any way deal in or handle milk which he has reason to believe has previously been dealt in or handled in violation of the provisions of this chapter. The commissioner may by official order exempt from the license requirements provided by this article, milk dealers who purchase or handle milk in a total quantity not exceeding three thousand pounds in any month, and/or milk dealers selling milk in any quantity in markets of one thousand population or less. Stores and farmers (including individuals and partnerships but not corporations) selling not more than one hundred quarts daily average of milk on the farm where produced to consumers coming there for it shall be exempt from the license requirements provided by this article.

258. *Application for license.* An applicant for a license to operate as a milk dealer shall file an application upon a blank prepared under authority of the commissioner. An applicant shall state such facts concerning his circumstances and the nature of the business to be conducted as in the opinion of the commissioner are necessary for the administration of this chapter. Such application shall be accompanied by the license fee required to be paid. The commissioner may classify licenses and may issue licenses to milk dealers to carry on a certain kind of business only, or limited to a particular city or village or to a particular market or markets in the state, and may specify the place or places where milk may be received from producers.

The license year shall commence on April first and end on March thirty-first following. An

application must be duly made at least thirty days before the commencement of the license year by all milk dealers then doing business, except that for the license year ending March thirty-first, nineteen hundred thirty-five, application shall be duly made within thirty days after this article takes effect by all milk dealers then engaged in business.

§258a. *License fees.* A milk dealer receiving, purchasing, handling or selling during any of the twelve calendar months immediately preceding the period for which the license is issued a daily average total quantity of milk not exceeding four thousand pounds shall pay a license fee of twenty-five dollars; and for each additional four thousand pounds of milk or fraction thereof received, purchased, handled or sold, the license fee shall be increased twenty dollars. In no event, however, shall a license fee in excess of five thousand dollars be required.

An applicant who has not previously engaged in such business shall pay the minimum license fee as provided herein for the type of business which he proposes to conduct. Any such applicant who during any calendar month of the first year covered by his license receives, purchases, handles or sells a greater volume of milk than that upon which the license fee paid by such milk dealer was based shall for each additional four thousand pounds of milk or fraction thereof pay an additional license fee of twenty dollars.

It is not the intent that milk utilized by the applicant or licensee or sold by him in the form of manufactured products shall be included in the determination of the amount of license fee, but the fluid milk equivalent of condensed or concentrated milk, except when sold in hermetically sealed cans, and/or of cream, shall be included in such determination. Sales by a milk dealer of milk outside of the state not involving the receipt or handling or distribution within the state shall

not be included in the determination of the license fee.

The commissioner may by rule or order, provide for licensing, at any rate of license fee less than the rates herein fixed, any milk dealer or class of milk dealers, generally or in a particular market, which he is authorized to exempt from license requirements.

A milk dealer who is a broker and who handles no milk physically and a milk dealer who neither buys nor sells milk but who operates a plant in which milk is pasteurized, processed or handled shall pay a license fee of twenty-five dollars.

A milk dealer which is a producers' bargaining and collecting co-operative and does not operate milk plants shall pay a license fee of twenty-five dollars.

A milk dealer receiving only milk utilized or sold in the form of manufactured products, other than condensed or concentrated milk, except when sold in hermetically sealed cans, and/or cream, shall pay a license fee of ten dollars.

§258-b. *Bonds and enforcement.*

1. Each milk dealer buying milk from producers for resale or manufacture or receiving milk from producers on consignment for the purpose of sale or manufacture, shall execute and file a bond, unless relieved therefrom as hereinafter provided. The bond shall be upon a form prescribed by the commissioner, shall be in the sum fixed by him, but not less than two thousand dollars, shall be executed by a surety company authorized to do business in this state, and shall be conditioned for the prompt payment of all amounts due to producers for milk sold by them to such licensee, during the license year. The bond shall be approved by the commissioner.

§258-c. *Granting and revoking licenses.* No license shall be granted to a person not now engaged in business as a milk dealer except for the continuation of a now existing business; and no license shall be granted to authorize the extension of an existing business by the operation of an additional plant or other new or additional facility, unless the commissioner is satisfied that the applicant is qualified by character, experience, financial responsibility and equipment to properly conduct the proposed business, that the issuance of the license will not tend to a destructive competition in a market already adequately served, and that the issuance of the license is in the public interest. The commissioner may decline to grant or renew a license or may suspend or revoke a license already granted, upon due notice and opportunity of hearing to the applicant or licensee, when he is satisfied of the existence of any of the following reasons:

(a) That a milk dealer has rejected, without reasonable cause, any milk purchased or has rejected without reasonable cause or reasonable advance notice, milk delivered in ordinary continuance of a previous course of dealing, except where contract has been lawfully terminated.

(b) That the milk dealer has failed to account and make payment without reasonable cause, for any milk purchased.

(c) That the milk dealer has committed any act injurious to the public health, public welfare, or to trade or commerce in demoralization of the price structure of pure milk to such an extent as to interfere with an ample supply thereof for the inhabitants of the state affected by this article which is hereby declared to be injurious to the public health, public welfare and to trade and commerce and evidence of a course of conduct on the part of the licensee tending to such demoralization

shall be construed to be prima facie evidence of a violation of this section.

(d) Where the milk dealer is insolvent or has made a general assignment for the benefit of creditors or has been adjudged a bankrupt or where a money judgment has been secured against him, upon which an execution has been returned wholly or partly unsatisfied.

(e) Where the milk dealer has continued in a course of dealing of such a nature as to satisfy the commissioner of his inability or unwillingness properly to conduct the business of receiving or selling milk or to satisfy the commissioner of his intent to deceive or defraud producers or consumers.

(f) Where the milk dealer has been a party to a combination to fix prices, contrary to law. A cooperative association of dairy-men organized under or operated pursuant to the provisions of chapter seventy-seven of the consolidated laws and engaged in making collective sales or marketing for its members or shareholders of dairy products produced by its members or shareholders shall not be deemed or construed to be a conspiracy or combination in restraint of trade or an illegal monopoly nor shall the contracts, agreements, arrangements or combinations heretofore or hereafter made by such association, or the members, officers or directors thereof, in making such collective sales and marketing and prescribing the terms and conditions thereof, be deemed or construed to be conspiracies or to be injurious to public welfare, trade or commerce; if otherwise authorized by such chapter or law.

(g) Where there has been a failure either to keep records or to furnish the statements or information required by the commissioner.

(h) Where it is shown that any statement upon which the license was issued is or was false or misleading or deceitful in any particular.

(i) Where the applicant or licensee has been convicted of a felony.

(j) Where the applicant is a partnership or a corporation and any individuals holding any position or interest or power of control therein has previously been responsible in whole or in part for any act on account of which a license may be denied, suspended or revoked, pursuant to the provisions of this article.

(k) Where the milk dealer has violated any of the provisions of this chapter.

(l) Where the milk dealer has been duly required to give a bond or an additional bond and has failed to do so.

(m) Where the required permit from the local health officer has terminated or been revoked.

(n) Where the milk dealer has ceased to operate the milk business for which the license was issued.

The commissioner may grant or renew a license or may decline to suspend or revoke a license conditionally, or upon the agreement of the licensee or applicant to do or omit to do any definite act, but such condition and or agreement must have some appropriate relation to the administration of this article.

Whenever a milk dealer's license is denied or revoked there shall be filed in the office of the division of milk control a memorandum by the director or by the person who presided at the hearing given to the applicant or licensee which memorandum shall briefly state the reasons for the denial or revocation of the

license, but formal findings of fact shall not be required to be made or filed.

Agricultural Marketing Agreement Act of 1937 (c. 296, 50 Stat. 246), 7 U.S.C. §§601 et seq.

Sec. 1. *Declaration of conditions.* It is hereby declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest; and burden and obstruct the normal channels of interstate commerce.

Sec. 2. *Declaration of policy; establishment of base periods for prices.* It is hereby declared to be the policy of Congress — (1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period. The base period in the case of all agricultural commodities except tobacco and potatoes shall be the pre-war period, August 1909-July, 1914. In the case of tobacco and potatoes, the base period shall be the post-war period, August 1919-July 1929; and, in the case of all commodities for which the base period is the pre-war period, August 1909 to July 1914, will also reflect current interest payments per acre on farm indebtedness secured by real estate and tax payments per acre on farm real estate, as contrasted with such interest payments and tax payments during the base period.

○ (2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current

level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under this title which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

Sec. 8c. Orders regulating handling of commodity—(1) Issuance by Secretary.—The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as “handlers.” Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

(2) Commodities to which applicable.—Orders issued pursuant to this section shall be applicable only to the following agricultural commodities and the products thereof (except products of naval stores and the products of honeybees), or to any regional, or market classification of any such commodity or product: Milk, fruits (including pecans and walnuts but not including apples, other than apples produced in the States of Washington, Oregon, and Idaho, and not including fruits, other than olives, for canning), tobacco, vegetables (not including vegetables, other than asparagus, for canning), soybeans, hops, honeybees and naval stores as included in sections 91 to 99 of this title and standards established thereunder (including refined or partially refined oleoresin).

(3) Milk and its products; terms and conditions of orders.—In the case of milk and its products, orders issued pursuant to this section shall contain one or

more of the following terms and conditions, and (except as provided in subsection (7)) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay; and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: *Provided*, That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered: subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such

order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time.

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection (5), providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) hereof.

(D) Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month, shall be made at the price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection (5).

(E) Providing (i) except as to producers for whom such services are being rendered by a cooperative marketing association, qualified as provided in paragraph (F) of this subsection (5), for market information to producers and for the verification of weights, sampling, and testing of milk purchased from producers, and for making appropriate deductions therefor from payments to producers, and (ii) for assurance of, and security for, the payment by handlers for milk purchased.

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

* * * * *

(6) *Other commodities; terms and conditions of orders.*—In the case of fruits (including pecans and walnuts but not including apples, other than apples produced in the States of Washington, Oregon and Idaho, and not including fruits, other than olives, for canning) and their products, tobacco and its products, vegetables (not including vegetables, other than asparagus, for canning) and their products, soybeans and their products, hops and their products, honeybees, and naval stores as included in sections 91 to 99 of this title and standards established thereunder (including refined or partially refined oleoresin), orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7)) no others:

(A) Limiting, or providing methods for the limitation of, the total quantity of any such commodity or product, or of any grade, size, or quality thereof, produced during any specified period or periods, which may be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods by all handlers thereof.

(B) Allotting, or providing methods for allotting, the amount of such commodity or product or any grade, size, or quantity thereof, which each handler may purchase from or handle on behalf of any and all producers thereof, during any specified period or periods, under a uniform rule based upon the amounts sold by such producers in such prior period as the Secretary determines to be representative, or upon the current

quantities available for sale by such producers, or both, to the end that the total quantity thereof to be purchased or handled during any specified period or periods shall be apportioned equitably among producers.

(C) Allotting, or providing methods for allotting, the amount of any such commodity or product, or any grade, size, or quality thereof, which each handler may market in or transport to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, under a uniform rule based upon the amounts which each such handler has available for current shipment, or upon the amounts shipped by each such handler in such prior period as the Secretary determines to be representative, or both, to the end that the total quantity of such commodity or product, or any grade, size, or quality thereof, to be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods shall be equitably apportioned among all of the handlers thereof.

(D) Determining, or providing methods for determining, the existence and extent of the surplus of any such commodity or product, or of any grade, size, or quality thereof, and providing for the control and disposition of such surplus, and for equalizing the burden of such surplus elimination or control among the producers and handlers thereof.

(E) Establishing, or providing for the establishment of, reserve pools of any such commodity or product, or of any grade, size, or quality thereof, and providing for the equitable distribution of the net return derived from the sale thereof among the persons beneficially interested therein.

(7) *Terms common to all orders.*—In the case of the agricultural commodities and the products thereof

specified in subsection (2) orders shall contain one or more of the following terms and conditions:

(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

(B) Providing that (except for milk and cream to be sold for consumption in fluid form) such commodity or product thereof, or any grade, size, or quality thereof shall be sold by the handlers thereof only at prices filed by such handlers in the manner provided in such order.

(C) Providing for the selection by the Secretary of Agriculture, or a method for the selection, of an agency or agencies and defining their powers and duties, which shall include only the powers:

(i) To administer such order in accordance with its terms and provisions;

(ii) To make rules and regulations to effectuate the terms and provisions of such order;

(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

(iv) To recommend to the Secretary of Agriculture amendments to such order.

• • • • •
Sec. 10. *Powers of Secretary of Agriculture generally.*

• • • • •
(i) *Cooperation with State authorities; imparting information.*—The Secretary of Agriculture upon the request of the duly constituted authorities of any State is directed, in order to effectuate the declared policy of this chapter and in order to obtain uniformity in the formulation, administration, and enforcement of Federal and State programs relating to the regulation of the handling of agricultural commodities or products thereof, to confer with and hold joint hearings

with the duly constituted authorities of any State, and is authorized to cooperate with such authorities; to accept and utilize, with the consent of the State, such State and local officers and employees as may be necessary; to avail himself of the records and facilities of such authorities; to issue orders (subject to the provisions of section 8c of this title) complementary to orders or other regulations issued by such authorities; and to make available to such State authorities the records and facilities of the Department of Agriculture: *Provided*, That information furnished to the Secretary of Agriculture pursuant to section 8d (1) of this title shall be made available only to the extent that such information is relevant to transactions within the regulatory jurisdiction of such authorities, and then only upon a written agreement by such authorities that the information so furnished shall be kept confidential by them in a manner similar to that required of Federal officers and employees under the provisions of section 8d(2) of this title.

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IN THE

Supreme Court of the United States

October Term, 1947

No. 864

92

H. P. HOOD & SONS, INC.,

Petitioner.

v.

C. CHESTER DU MOND, Commissioner of Agriculture
and Markets of the State of New York.

BRIEF FOR COMMISSIONER OF AGRICULTURE AND MARKETS IN OPPOSITION TO WRIT OF CERTIORARI

NATHANIEL L. GOLDSTEIN, *Attorney General,*
State of New York.

WENDELL P. BROWN, *Solicitor General.*

DONALD L. BRUSH, *Counsel.*

ROBERT G. BLABEY, *Associate Counsel.*

Attorneys for Respondent.

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Supreme Court of the United States

October Term, 1917

No. 861

H. P. HOOD & SONS, INC.,

Petitioner,

v.

C. CHESTER DU MOND, Commissioner of Agriculture
and Markets of the State of New York;

BRIEF FOR COMMISSIONER OF AGRICULTURE AND MARKETS IN OPPOSITION TO WRIT OF CERTIORARI

Statement

The proceeding in the nature of certiorari was instituted pursuant to Article 78 of the New York Civil Practice Act to review an administrative determination of the Commissioner of Agriculture and Markets which (1) renewed petitioner's milk dealer license, and (2) denied its extension to permit the operation of a new milk plant at Greenwich, New York (R. 15, 21).

Opinions Below

The court of original jurisdiction was the Special Term of the New York Supreme Court which referred the pro-

ceeding to the Appellate Division for review and determination pursuant to the 6th and 7th subdivision of Civil Practice Act section 1296 (R. 4, 12). An unpublished opinion was written on a motion by the commissioner to strike from the petition certain language in the nature of mandamus (R. 424).

The Appellate Division handed down two concurring opinions unanimously confirming the commissioner's order (271 App. Div. 394; R. 135, 137).

The Court of Appeals' opinion is found in 297 N. Y. 209, 78 N. E. (2d) 476; (R. 148).

The Question

The commissioner acted under section 258-c of the New York Agriculture and Markets Law. Its opening paragraph is the pertinent one. It reads:

"No license shall be granted to a person not now engaged in business as a milk dealer* except for the continuation of a now existing business, and no license shall be granted to authorize the extension of an existing business by the operation of an additional plant or other new or additional facility, unless the commissioner is satisfied that the applicant is qualified by character, experience, financial responsibility and equipment to properly conduct the proposed business, that the issuance of the license will not tend to a destructive competition in a market already adequately served, and that the issuance of the license is in the public interest."

Notwithstanding the admission in petitioner's briefs below that no restrictions or conditions are imposed upon the license granted by the commissioner and despite the

* Not a prohibition. See *Matter of Elite Dairy Products v. Ten Eyck*, 271 N. Y. 488 at 493, 494.

fact that under its license petitioner operated three milk plants in New York (Exhibit 5, p. 2, R. 118; R. 38 fol. 113), it contended in the Court of Appeals that the commissioner's refusal *to extend its license* to permit the operation of a fourth plant constituted an embargo or prohibition against its interstate milk shipments to the violation of the Commerce Clause.

It is important to understand that no such contention was made or even suggested on the administrative hearing before the commissioner. Indeed, there was no constitutional question before the commissioner, and so the hearing record is absolutely barren of the necessary proof to support one. However, the Court of Appeals ruled that the mention of petitioner's argument in its Appellate Division brief made a constitutional point available to petitioner in that court, and granted leave to appeal from the unanimous order of the Appellate Division (R. 140).

Thus the constitutional question, if any, can only be whether the commissioner's denial of petitioner's application to extend its milk dealer license to authorize the operation of a milk plant at Greenwich, New York, contravenes the Commerce Clause of the Federal Constitution.

ARGUMENT

1. There is no constitutional question to be reviewed by this Court.

Like a complaint, the petition for review under Article 78 must frame the issue (New York Civil Practice Act section 1288). The Court of Appeals found that the constitutional point was not raised in the petition (R. 149).

Since the pleadings do not frame a constitutional issue, there is no allegation as to the nature or extent of the bur-

den or obstruction claimed to be imposed on petitioner's interstate shipments. There is no showing as to the proportionate relation petitioner's milk shipments bear to the total milk exported from New York State; and there is nothing as to the ratio between total export and total intrastate shipments. The New York Court of Appeals recognized this insufficiency and said in its opinion: "It may be remarked that there is here no showing as to how much New York milk is exported across the state line. Absent such a showing, we cannot tell what proportion such interstate shipments bear to the whole of the production as to which the state licensing statute operates" (R. 151). It has been said that constitutional questions are dealt with only as they are appropriately raised upon the record. (*Allen-Bradley Local v. Board*, 313 U. S. 740, 746).

The hearing record clearly shows that the parties to the administrative hearing did not comprehend the kind of proof which we say is material to a determination of the constitutional issues now raised by petitioner's specification of error because it goes directly to the question whether a burden, if existing, is incidental and therefore not forbidden or, on the other hand, is unreasonable and therefore prohibited. "As has been so often stated but nevertheless seems to require constant repetition, not all burdens upon commerce, but only undue or discriminatory ones, are forbidden." (*Nippert v. Richmond*, 327 U. S. 416, 425).

The petition (p. 3) urges that the question is whether the commissioner's order denying a license to purchase and ship interstate obstructs interstate commerce. That seems to us to be a strained interpretation. The commissioner granted petitioner a license to deal in, purchase, handle, distribute and sell milk according to the intent expressed

by petitioner in its application (R. 33). We say there is no obstruction, and petitioner in its Appellate Division brief conceded the situation, saying:

"No restrictions or conditions are imposed upon the license. The application upon which it was granted lists (Exhibit 5, fols. 352, 357), on page 2 thereof, the two plants already mentioned, operated by petitioner, and the plant at Norfolk, New York, also operated by petitioner, as the plants or stations owned or operated by it where it receives milk from producers. Petitioner has already enlarged the plant at Eagle Bridge (fol. 122) so that it has a contemplated capacity of 40,000 pounds to 60,000 pounds per hour, or approximately 500 cans (fol. 138) per hour. The producers at Eagle Bridge deliver between 1,000 and 2,000 cans of milk during the year (fol. 166), so it is apparent that the Eagle Bridge plant of petitioner could handle additional milk and it is reasonable to assume that the plant at Salem could do likewise. In any event, there is nothing to prevent the petitioner from enlarging its present plants and going out to seek as many producers as it needs to satisfy its requirements, without opening a plant at Greenwich." (Hood Appellate Division brief, p. 17).

Petitioner's argument in support of the Writ, at least from the character of its case citations, seems to ignore the fact that petitioner is licensed in New York; that it recently greatly enlarged with approval its Eagle Bridge plant; and that as appears in the quotation above there are no restrictions on its purchases of milk in New York.

The most that this record shows for petitioner is that during the peak or "flush" period it would be more convenient to direct some milk from Eagle Bridge and Salem to the new plant (R. 40). The peak period is not over six weeks (R. 46) and Exhibit 5 at page 4, item 24, shows the month of June as the month of maximum purchases (R. 118, R. 38, fol. 113). All milk plants whether they serve

Boston or New York operate under similar conditions and all milk plants must meet the same Board of Health requirements* (R. 47).

Thus, while petitioner's argument is one for convenience—a contention which will not usually support a constitutional claim—it entirely ignores its own proof on the administrative hearing that within thirty days from that time the Eagle Bridge plant would become a so-called new plant (R. 56) with greatly enlarged capacity up to 60,000 pounds per hour (R. 46. Compare with former 35,000 pounds per hour capacity. R. 49-50) together with storage tank capacity of 700 cans** which it did not have when it made application to extend its license (R. 49).

Petitioner urges a conflict between the state licensing law and federal authority in the form of federal order No. 4—the Boston Milk Marketing Order. The licensing of milk dealers in New York is predominantly, if not entirely, local. When in *Baldwin v. Seelig*, 294 U. S. 511, it was made apparent the states could not project their price regulations into other jurisdictions, the milk marketing economists looked to federal cooperation in the form of the Boston and New York milk marketing orders*** to accomplish producer price regularity when the milk is sold in these city outlets. That is as far as federal policy goes.

* Under the health regulations, the producer cools his evening's milk. If he delivers his morning's milk before 9 A. M. he does not need to cool it and the plant does. If he delivers after 9 A. M. he must then cool his morning's milk also (R. 40).

** In round numbers, 85 pounds to a can or 59,500 pounds.

*** The present and the earlier emergency law contain provision for interstate and federal-state control of the prices of milk handled in interstate commerce (Agriculture and Markets Law section 258-m). In both New York and Boston, the price is fixed to the producer only. See, also, separability clause of section 258-j.

By the Agricultural Marketing Agreement Act of 1937 (c. 296, 50 Stat. 246), 7 U. S. C. §§ 601 *et seq.* and the Boston Order the Federal Government did not take over milk dealer licensing from the states. The state stands alone in the licensing field. The Marketing Agreement Act and the Boston Order do not regulate the number of dealers in a market or the number of milk plants each dealer may operate. Order No. 4, the Boston Order, is not in this record. If it is to be noticed then it is pointed out that it relates to a "handler", as the dealer is called, only, if and when he purchases milk from producers who will ship to him in the administratively defined Boston Market and then only as to the *price* the dealer is required to pay his producers. In other words, it is price control. The state on this record does not regulate milk prices paid to or by anyone. The commissioner has not attempted nor suggested an attempt to interfere in any way with whatever price Hood pays New York producers.

Below we brought *Milk Control Board v. Eisenberg Farm Products*, 306 U. S. 346, to the attention of the Court of Appeals. (Compare with *Baldwin v. Seelig*, 294 U. S. 511, on which petitioner at bar relies and which is distinguished at pages 570-571 in *United States v. Rock Royal Co-Op.*, 307 U. S. 533). In the Eisenberg case the petition for the Writ of Certiorari states the question then presented as follows:

"May a State statute regulating the milk industry *by requiring that all milk dealers obtain a license, file a bond for the protection of farmers, and pay to farmers minimum prices prescribed by an administrative agency (or any one of said requirements) be enforced against a milk dealer buying the milk at its plant within the State from farmers located therein for shipment to another State?*" (italics supplied)

2. The Commissioner has not done and does not threaten to do anything to interfere with, embargo, or place an unconstitutional burden on petitioner's interstate milk shipments.

In simple terms licensing by the state is the issue at bar. Petitioner is already licensed. There has been no discrimination. In his treatment of petitioner the commissioner has acted in the same way he acts with respect to New York residents. The Federal Congress when it acted sought to cooperate with the states on producer price control, and, going no further, did not act in milk dealer licensing matters which are entirely left to the state. Under such circumstances and on such a record it would seem certiorari to this Court would not lie.

The commissioner's determination should be read as a whole. Especial emphasis on individual findings distorts it. If there can be no state license control, then of course there can be no regulation of the number of milk plants operated by a dealer, and Hood would be entitled to unlimited plants in New York. However, if there still is license control by New York then a determination which denies Hood an additional plant because it failed to show a need for one would not seem to be an unsound decision constitutionally. The need is demonstrated by factual proof on the administrative hearing and the burden was on petitioner as applicant.

Wherefore, it is respectfully submitted that the petition of H. P. Hood & Sons, Inc. for a Writ of Certiorari should be denied.

*NATHANIEL L. GOLDSTEIN, Attorney General,
State of New York.*

WENDELL P. BROWN, Solicitor General.

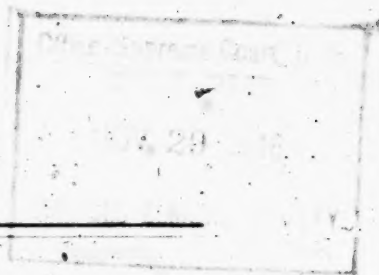
DONALD L. BRUSH, Counsel.

ROBERT G. BLABEY, Associate Counsel.

Attorneys for Respondent.

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No. 92



In the Supreme Court of the United States

OCTOBER TERM, 1948

H. P. HOOD & SONS, INC., PETITIONER

v.

C. CHESTER DeMOND, COMMISSIONER OF
AGRICULTURE AND MARKETS OF THE
STATE OF NEW YORK

ON WRIT OF CERTIORARI
TO THE SUPREME COURT FOR THE COUNTY
OF ALBANY, STATE OF NEW YORK

RESPONDENT COMMISSIONER'S BRIEF

ROBERT G. BLABEY,
Counsel for Respondent.

NATHANIEL L. GOLDSTEIN, Attorney General, and
DONALD L. BRUSH, Department Counsel,
*Attorneys for respondent Commissioner of
Agriculture and Markets of the State of New York.*

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 92

H. P. HOOD & SONS, INC., PETITIONER

**C. CHESTER DeMOND, COMMISSIONER OF
AGRICULTURE AND MARKETS OF THE
STATE OF NEW YORK.**

**ON WRIT OF CERTIORARI
TO THE SUPREME COURT FOR THE COUNTY
OF ALBANY, STATE OF NEW YORK.**

RESPONDENT COMMISSIONER'S BRIEF

Opinions Below

The court of original jurisdiction was the Special Term of the New York Supreme Court which referred the proceeding to the Appellate Division for review and determination pursuant to the 6th and 7th subdivisions of New York Civil Practice Act section 1296 (R. 2, 6, 7). An unpublished opinion was written on a motion by the commissioner to strike from the petition certain language in the nature of mandamus (R. 95, 98). The Appellate Division handed down two concurring opinions unanimously confirming the commissioner's order (271 App. Div. 394; 66 N. Y. S. 2d. 732; R. 101, 102). The Court of Appeals' opinion is found in 297 N. Y. 209; 78 N. E. 2d. 476; (R. 111).

Statement

The petitioner is a huge corporate milk dealer (R. 87). With twenty-six country plants, not including its secondary market facilities, it operates throughout the New England states where it has several outlets for its fluid milk (R. 28). It operates three milk receiving stations in New York State (R. 88, 23). Having an option to purchase a plant at Greenwich, New York, formerly operated by the Greenwich and Easton Farm Products Company, it asked the respondent "in compliance with your Orders and Regulations" to extend the New York milk dealer's license it had held for many years (R. 86, Ex. 4, R. 23). An administrative hearing was held on this extension request (R. 21). Petitioner's existing license was renewed, but its extension request was denied (R. 8-9). Without protesting or surrendering the license granted by respondent, petitioner at once contested respondent's refusal to extend it (R. 3). The court review was in the nature of certiorari (N. Y. Civil Practice Act, Article 78) and thus below the weight of the proof supporting the administrative determination was the issue (R. 7).—The petition does not allege a single constitutional ground (R. 6-7), nor was any such contest raised in the pleadings by joinder of issue (R. 14, 15, 16).

After the proceeding had been argued in the Appellate Division petitioner asked leave of the Court of Appeals to appeal to that bench on the sole constitutional ground that the respondent's order violated the commerce clause of the federal constitution (R. 111). Despite the fact that the parties to the administrative hearing do not seem to have comprehended such an issue before the commissioner and notwithstanding the silence on any such point in the pleadings, the Court of Appeals heard petitioner's argument (R. 112) and decided against it (R. 107).

For the first time the Boston Marketing Order was mentioned in the Court of Appeals as an alleged conflict with New York's licensing activity (R. 114-115).

As the legal issue has developed in the course of appeal, the respondent has been forced to meet a constitutional argument based upon an administrative record which in our opinion falls too far short of the minimum requirement. If in attempting to supply the record's deficiencies we draw (as petitioner has done) upon outside sources, our privilege in that respect will be understandable.

Question Presented

We do not see the question as put by petitioner's brief (p. 2). It is not whether the commissioner's order denying petitioner "a license to purchase and ship milk in interstate commerce" violates the Commerce Clause. Petitioner is already licensed to purchase and ship milk anywhere without any restriction or condition imposed (R. 20, 85, 22). The questions, if any, must be:

- a. Whether the commissioner's order refusing petitioner permission to equip an *additional* New York plant at which to receive and handle milk from producers on the ground it "would tend to a destructive competition in a market already adequately served, and would not be in the public interest," unreasonably burdens interstate commerce, and if not, then
- b. Whether the commissioner's order illegally conflicts with Federal Milk Order No. 4.

Argument Summary

1. The commissioner's order does not unduly burden, unconstitutionally obstruct nor unreasonably restrict in-

terstate commerce. Despite the fact petitioner holds an unlimited license from the commissioner it claims the "quantity" of its commerce is restricted. There is no proof in this record to support such a claim. In its Appellate Division brief¹ petitioner frankly said that its plant at Eagle Bridge and Salem have the capacity to handle additional milk. In answer to an inquiry from the bench in the Court of Appeals, petitioner's counsel informed the court that petitioner was shipping out of New York unhindered all its milk purchases. Petitioner does not deny this as a fact, but now urges in answer that there ²may be a time when present facilities would become inadequate and therefore it is possible that the order, the effect of which expired with the license year on March 31, 1947 (R. 13) may limit petitioner's unknown future activity. Well of course there must be a time when the argument of remote contingencies must end. A respondent should not be unfairly prejudiced by the necessity of meeting after-thoughts once the hearing record is closed. It has been said that this court does not deal with theoretical disputes but with concrete and specific issues, and that "Constitutional questions are not to be dealt with abstractly." (*Allen-Bradley Local v. Board*, 315 U.S. 740, 746).

¹No restrictions or conditions are imposed upon the license. The application upon which it was granted lists (Exhibit 5), on page 2 thereof, the two plants already mentioned, operated by petitioner, and the plant at Norfolk, New York, also operated by petitioner, as the plants or stations owned or operated by it where it receives milk from producers. Petitioner has recently enlarged the plant at Eagle Bridge so that it has a contemplated capacity of 40,000 pounds to 60,000 pounds per hour, or approximately 500 cans per hour. The producers at Eagle Bridge deliver between 1,000 and 2,000 cans of milk during the year, so it is apparent that the Eagle Bridge plant of petitioner could handle additional milk and it is reasonable to assume that the plant at Salem could do likewise. In any event, there is nothing to prevent the petitioner from enlarging its present plants and going out to seek as many producers as it needs to satisfy its requirements, without opening a plant at Greenwich."

2. New York by its milk dealer licensing cooperates with federal marketing control, and Agriculture and Markets Law section 258-e coincides with and is supplemental to the Agricultural Marketing Agreement Act by stabilizing production markets so as to support federal order pricing. (Compare the declaration of policy found in sections 258-k and 258-n (Appendix, pp. 24-25) with the declaration of policy and cooperation found in the Agricultural Marketing Agreement Act as recited in 7 U. S. C. sections 602 and 610 (i) (Appendix pp. 25-26)). Later we will factually demonstrate how the cooperation has actually been worked in practice. Where such cooperation is shown, this court has been reluctant to strike down state action, and such effect as the state regulation may have upon interstate commerce is incidental and not forbidden. In short there is no conflict, and petitioner's complaint is not really against solitary state action but rather against cooperative federal-state control for both New York City and Boston.

3. Petitioner is estopped from attacking the commissioner's order. By the same order, it received license and a valuable property right. While availing itself of its benefits, it cannot without protesting or surrendering its license, constitutionally attack that part of the order which it considers a future burden. We have consistently asserted estoppel. Our answer contains a specific affirmative defense (R. 16). We asserted it in the Court of Appeals under a point heading which said "petitioner's position is constitutionally untenable." While last in our argument here, we again urge it as of primary significance.

ARGUMENT

I

The Commissioner's order does not unduly burden, unconstitutionally obstruct, nor unreasonably restrict interstate commerce.

While petitioner's brief insists that a license has been denied permitting it to make interstate purchases of milk, not the slightest proof to support that claim can be found in this record. On the contrary, the proof is (1) that petitioner has been licensed without condition or limitation (R. 22, 85) and (2) that its prior license was renewed (R. 9, 20).

The proof also shows that under its license petitioner expanded its facilities in New York by converting Eagle Bridge into a so-called "new plant" with a tremendously enlarged capacity² of 40,000 to 60,000 pounds per hour (R. 31). Sixty thousand pounds per hour means about 706 forty-quart cans per hour. There is storage for 600 cans, and a separate storage tank of 100 can capacity for skim (R. 31, fol. 49). Petitioner's witness testified that the Eagle Bridge plant had not been bothered by lack of storage facilities and the new equipment would "step up the capacity" (R. 31). Before the change, the Eagle Bridge plant had a capacity of 35,000 pounds per hour with a day's operation beginning at 7:00 o'clock in the morning and ending at 1:30 o'clock in the afternoon (R. 32).

Now the most the petitioner could anticipate at Greenwich is receipt of 300 cans which it would take out of Eagle Bridge and Salem and divert to Greenwich. At best 500

² Capacity means handling, cooling and loading tank cars (R. 31).

cans, "probably", in the flush season was conjectured (R. 42). The reason given for this change was that it would convenience 80 to 100 producers in the vicinity of Greenwich who would save five or six miles on their hauling costs (R. 25, 41, 42). Even if it were pertinent to the constitutional point, we cannot tell exactly what the saving in hauling cost would be, if any, (hauling is customarily arranged between producer and trucker³ and often at a flat rate regardless of distance), but this proof does demonstrate that petitioner's claim the commissioner has barred interstate purchases at Greenwich is considerably adulterated since that milk is and has been moving interstate without interference from respondent. In any event these Hood producers are not parties to this proceeding; did not appear at the administrative hearing; and do not assert any claim at court.

The real reason for petitioner's extension request is one of convenience to itself. On the hearing petitioner's witness said that in the peak season milk had been rejected by the Boston Health Board "due to the inability of our plant facilities to handle the peak volume before 9 A. M." (R. 25, fol. 40). In the first place that is not a health requirement peculiar to Boston. New York City regulations also require delivery of morning milk to the plant before 9 A. M. (R. 30). If morning's milk is cooled on the farm it may be handled an hour later (R. 25).⁴ All milk plants operate under that requirement, but in the next place the inconven-

³ Petitioner's witness said it ranged from 15 to 20 cents per cwt., but did not testify whether the rate would vary with the mileage (R. 30). Thus, we do not know if there would be any financial saving. The witness talked about mileage saving (R. 42).

⁴ Under the health regulations, the producer cools his evening's milk. If he delivers his morning's milk before 9 A. M. he does not need to cool it and the plant does. If he delivers after 9 A. M., he must then cool his morning's milk also.

ience, if any, only lasts during the flush season, a period of about six weeks (R. 29) and most likely in the month of June which is shown as the month of maximum purchases (R. 87, Ex. 5, Item 7; R. 23).

There is nothing in this record from which it can be learned how efficiently petitioner is running its plants. Another dealer with efficient operational methods might not have that problem. A new plant is not necessarily the remedy. Petitioner might have any number of new plants and still have operational problems. The new Eagle Bridge plant with its greatly increased capacity may already have eliminated it because the 25,000 pound per hour capacity increase is about equal to the amount of milk petitioner would divert from Salem and Eagle Bridge to Greenwich. Petitioner's argument is one for convenience. A matter of convenience will not support a constitutional objection.

Petitioner's brief (p. 12) points out that there is no contention here that because the petitioner's business is interstate it is immune from all the requirements of the New York licensing statute. Petitioner wishes to pick and choose its attack saving what it considers of benefit and destroying its annoyances. Petitioner does attack the licensing statute as we shall demonstrate in our next point, and stripped of all legal niceties, licensing by the state is the sole issue in this case.

We think of *Milk Control Board v. Eisenberg Farm Products*, 306 U. S. 346 as controlling. Said the court (352-353):

"The respondent maintains a receiving station in Pennsylvania where it conducts the local business of buying milk. At that station the neighboring farmers deliver their milk. The activity affected by the regulation is essentially local in Pennsylvania. Upon the completion of that transaction the respondent engages in conserving and transporting its own property. The

Commonwealth does not essay to regulate or to restrain the shipment of the respondent's milk into New York or to regulate its sale or the price at which respondent may sell it in New York. If dealers conducting receiving stations in various localities in Pennsylvania were free to ignore the requirements of the statute on the ground that all or a part of the milk they purchase is destined to another state the uniform operation of the statute locally would be crippled and might be impracticable. Only a small fraction of the milk produced by farmers in Pennsylvania is shipped out of the Commonwealth. There is, therefore, a comparatively large field remotely affecting and wholly unrelated to interstate commerce within which the statute operates. These considerations we think justify the conclusion that the effect of the law on interstate commerce is incidental and not forbidden by the Constitution, in the absence of regulation by Congress."

The New York Court of Appeals said that it couldn't tell what proportion petitioner's shipments bear to the whole production to which the licensing statute relates. Failing such a showing, that court considered any interference "incidental only" (R. 114). The interference, if any, is a strained technical one, and not actual. Congress has not attempted to license milk dealers in New York any more than it regulated them by license in Pennsylvania in Eisenberg's day.

II

New York by its milk dealer licensing cooperates with Federal Marketing Control and Agriculture and Markets Law section 258-c coincides with and is supplemental to the Agricultural Marketing Agreement Act by stabilizing production markets so as to support federal order pricing.

The history of state-federal cooperation in milk begins with the strikes and riots of 1933-34. As this court found in

Nebbia v. New York, 291 U. S. 502, "unrestricted competition aggravated existing evils, and the normal law of supply and demand was insufficient to correct maladjustments detrimental to the community" (530). The legislature had conducted a complete economic investigation and the "existing evils" were found and reported (*Nebbia*, 516-517). The peculiar instability of the fluid milk industry, it said, called for special methods of control. The first emergency Milk Control Law declared its need,⁵ and then and there vested authority in the Milk Control Board "to confer with legally

⁵ Chapter 158, New York Laws of 1933, section 300. Legislative finding; statement of policy.

"This article is enacted in the exercise of the police power of the state, and its purposes generally are to protect the public health and public welfare. It is hereby declared that unhealthful, unfair, unjust, destructive, demoralizing and uneconomic trade practices have been and are now carried on in the production, sale and distribution of milk and milk products in this state, whereby the dairy industry in the state and the constant supply of pure milk to inhabitants of the state are imperiled. That such conditions constitute a menace to the health, welfare and reasonable comfort of the inhabitants of the state. That in order to protect the well-being of our citizens and promote the public welfare, and in order to preserve the strength and vigor of the race, the production, transportation, manufacture, storage, distribution and sale of milk in the state of New York is hereby declared to be a business affecting the public health and interest. That the production and distribution of milk is a paramount industry upon which the prosperity of the state in large measure depends. That the present acute economic emergency, being in part the consequence of a severe and increasing disparity between the prices of milk and other commodities, which disparity has largely destroyed the purchasing power of milk producers for industrial products, has broken down the orderly production and marketing of milk and has seriously impaired the agricultural assets supporting the credit structure of the state and its local governmental subdivisions. That the danger to the public health and welfare is immediate and impending, the necessity urgent and such as will not admit of delay in public supervision and control in accord with proper standards of production, sanitation and marketing. The foregoing statement of facts, policy and application of this article are hereby declared as a matter of legislative determination."

constituted authorities of other states and of the United States, with respect to a uniform milk control within the states and/or as between states, and may enter into a compact or compacts for such uniform milk control, subject to such federal approval as may be required by law" (§ 314). The Milk Control Board existed one year only. In 1934 certain features of the law, milk dealer licensing and bonding among them, were incorporated in the permanent Agriculture and Markets Law⁶ while the temporary milk pricing program continued to be reenacted yearly until it went out on March 31, 1937.⁷ The 1934 Act granted the commissioner—as distinguished from the board—authority to confer with the United States on uniform milk control⁸ and in 1937 (when New York price control expired) gave him the present power found in section 258-n.⁹ It is distinctly clear, therefore, that the cooperative governmental idea was not a recent happenstance to meet federal action in 1937. It was there from the beginning when one month after New York's 1933 legislation (April 10, 1933) Congress enacted the Agricultural Adjustment Act of May 12, 1933.

Meanwhile in 1934 the commissioner had entered into the trials and tribulations of *Baldwin v. Seelig*, 294 U. S. 511 (decided March 4, 1935). But before the pricing program collapsed with the decision in that case, a public hearing had been held at Chancellor's Hall in the State Education Building at Albany, New York,¹⁰ at which Governor Lehman appeared and announced a milk code which had been sub-

⁶ Chapter 126, New York Laws of 1934.

⁷ Chapter 876, New York Laws of 1937. #5.

⁸ Section 258-p.

⁹ Appendix, pps. 24-25.

¹⁰ Hearing No. 18, New York Milk Control Board, January 9, 1934. Appendix, pp. 26-27.

mitted to Washington. The Governor emphasized the need for federal cooperation and said that even then two members of his Agricultural Advisory Committee were in Washington to confer with federal authorities. Said Governor Lehman to the 1200 dairy farmers, representatives of distributors and consumers: "I feel that every effort should be made by you gentlemen to strengthen the hands of your Governor and the hands of your Milk Control Board in the effort to secure Federal cooperation to stabilize, regulate and control the milk industry engaged in interstate commerce within the New York Milk shed." (For complete text see Appendix, p. 27.

Following repeated conferences of state officials at Washington, federal action came in the form of a marketing order for the New York Metropolitan area. (Federal Order 27—State Order 126.) New York's commissioner Holton V. Noyes and secretary H. A. Wallace entered into a compact of joint control on behalf of their respective governments. (Appendix, pp. 30-31).

Meantime Boston Order No. 4, later suspended during litigation, was issued February 7, 1936 pursuant to the Act of May 12, 1933, as amended August 24, 1935. (*H. P. Hood & Sons, Inc. v. U. S.*, 307 U. S. 588, 591).

New York dairymen voted by referendum whether they wished federal-state control. A pamphlet issued by the United States Department of Agriculture at the time (Marketing Information Series, DM-6, August, 1938, "New York Milk") contained a paragraph headed "Joint State and Federal Administration" in which the following appears:

"The program would be administered by a market administrator named by the Secretary of Agriculture and the Commissioner of Agriculture and Markets. The

market administrator would administer both the Federal and the State orders, thus making it possible for the Federal and State Governments to operate jointly."

In another pamphlet issued a month after the New York Order became effective (D. M.-8, October 1938, "The Federal-State Program for the New York Milk Market") the United States Department of Agriculture traced the development of state-federal action.¹¹

The *Boston Hood* case and the New York *Rock Royal* case reached this court about the same time and were decided together (June 5, 1939). In the *Rock Royal* case (307 U. S. 533) this court found State-Federal cooperation saying (pp. 548-549):

"The cooperation of the two governments was the culmination of a course of investigation and legislation which had continued over many years. The problem from the standpoint of New York was fully considered and the results set out in the Report of 1933 of the Joint

"In an effort to meet these conditions, milk producers started a move to invoke the regulatory features of the Rogers-Allen Act, and at the same time requested the help of the Federal Government in regulating the handling of milk that comes into New York from outside the State. They sought a program to establish uniform rules under which handlers would buy their milk from producers both in and out of the State. Such a program, they felt, would overcome the weaknesses of earlier efforts which were confined to milk produced within the State.

"Efforts to develop such a program continued for nearly a year. Through conferences with representatives of producers, consumers, distributors, and representatives of the Agricultural Adjustment Administration and the New York State Department of Agriculture and Markets, a proposed Federal-State program was developed. This proposal was considered at a series of public hearings held in various sections of New York State from May 16 to June 8, 1938. The hearings were conducted jointly by the Secretary of Agriculture and the New York State Commissioner of Agriculture and Markets, and gave producers, consumers, and distributors an opportunity in which to express their views on the proposal."

Legislative Committee to Investigate the Milk Industry. This investigation was followed by the creation of the Milk Control Board with broad powers to regulate the dairy business of the state. This board had power to fix prices to be paid to producers and to be charged to consumers. A later New York act, the Rogers-Allen Act, authorized the state commissioner to cooperate with the federal authorities acting under the present Marketing Agreement Act, and to issue orders supplementary to those of the Federal Government to be carried out under joint administration."

At this point in our argument the question naturally arises as to how Agriculture and Markets Law section 258-c ties in with federal marketing orders. Section 258-c came into the statute in 1934 (Chapter 126, *supra*). By it the Legislature intended to limit the grant of license and license extension (*Matter of Elite Dairy Products v. Ten Eyck*, 271 N. Y. 488, 494). "It is not a program of "freezing in"¹² established dealers as petitioner's brief suggests. It is designed to stabilize the production area by controlling tendencies to destructive competition among dealers fighting for sources of supply. It maintains a fair division among producers of the marketing outlets. The commissioner knows from bitter experience what unlicensed, uncontrolled milk plant competition does to the farmer and his "purchasing power", to use the language of the Agricultural Marketing Agreement Act.¹³ A sales market without a dependable source of supply has nothing to sell.

Back in the production area the milk plant's continuance is dependent on adequate volume. If its intake goes below a certain point, it runs at a loss. Volume is the key to its

¹² Its constitutionality was challenged on that ground. It is not a prohibition against new licenses or new license extension. See *Matter of Elite Dairy Products v. Ten Eyck*, 271 N. Y. 488 at 492-493.

¹³ Section 1, Act of 1937 (c. 296, 50 Stat. 246) 7 U. S. C. § 601.

efficiency. The tendency is for cost per hundredweight to decrease as volume of milk increases.¹⁴

Hood's Greenwich plant would start with an 800 can capacity (R. 28). Its witness frankly stated it would "expand its operations in the vicinity of Greenwich" (R. 27). Only 300 cans would be diverted from Salem to Eagle Bridge (R. 25). Where would the additional milk come from to make up the balance in Greenwich and supply the deficiency caused in Salem and Eagle Bridge by the diversion. It could only come from neighboring plants—

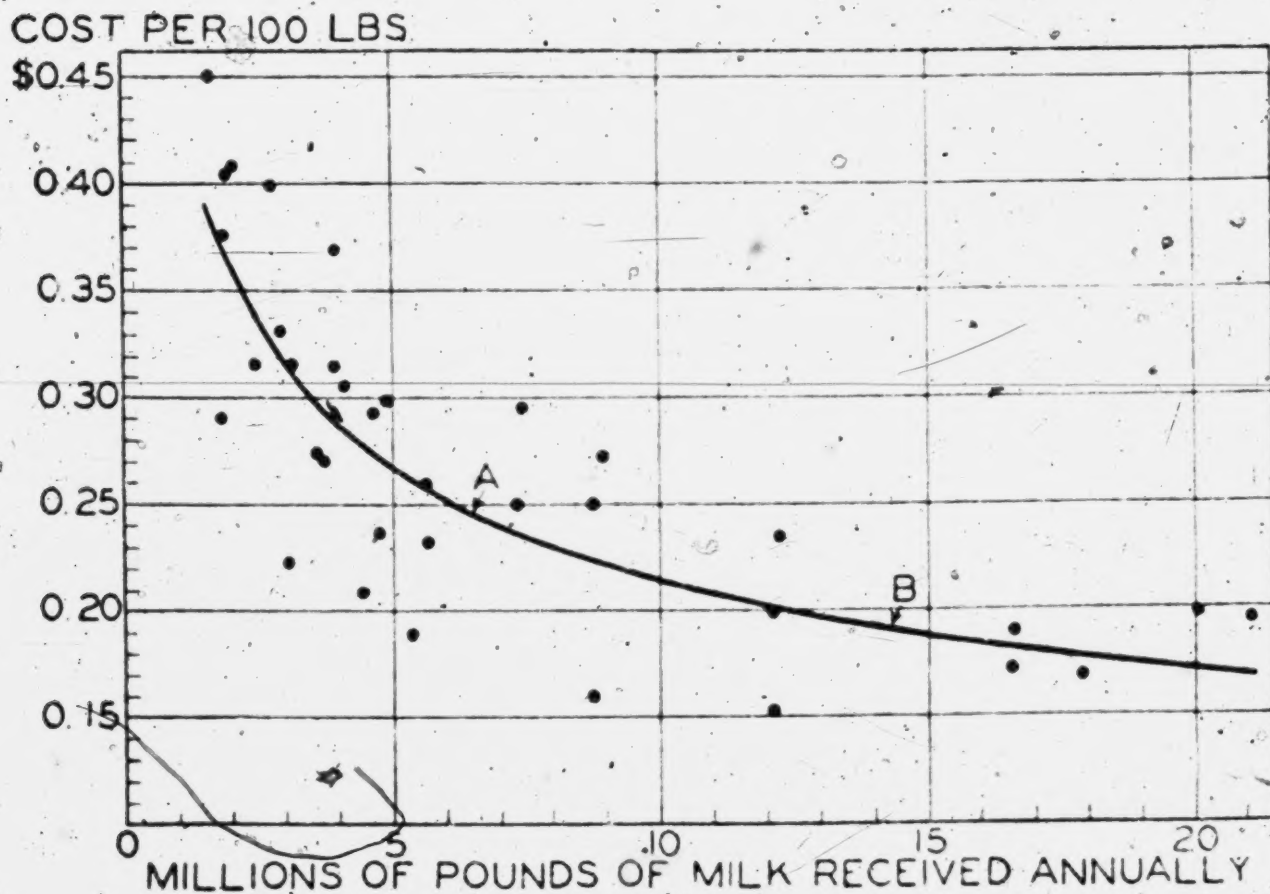


FIGURE 15. RELATION OF VOLUME OF MILK HANDLED TO OPERATING COST PER 100 POUNDS, 38 RAW-MILK PLANTS

(Tucker, C. K. Costs of handling fluid milk and cream in country plants. Cornell Univ. Agr. Exp. Sta. Bul. 473. 1929)

The position of each dot shows the volume of milk received during the year and the cost of operation per 100 pounds in one plant. The curved line indicates the tendency for cost per hundredweight to decrease as the volume of milk increases. Any point on the curved line represents the approximate average cost of handling 100 pounds of milk in plants of the given volume. Point A represents the volume and cost for all plants in the area; point B represents the volume and cost after eliminating the non-essential plants

From Cornell University Bulletin 486 entitled: "An Economic Study of the Collection of Milk at Country Plants in New York." Page 34.

from plants approved for the federal New York Order at Fort Edward, Granville and Buskirk, New York (R. 44-45). As for the local market at Troy—to which petitioner directs special attack—the problem is no different. If Hood raids Fort Edward, Granville, or Buskirk, all nearby, they in turn cannot be expected to stand idly aside and not protect their investment. At the time of hearing they already had unused capacity. The New York Order approved Sheffield Farms' plant at Cambridge,¹⁵ just ten miles from Greenwich, with a 600 can capacity was taking in but 350 cans of milk after thirty years of operation (R. 56). Buskirk was running under capacity (R. 68). The Dairymen's League had closed its plant at Greenwich (R. 49).

The producers, too, are affected by plant changes. The field representative of the Washington and Rensselaer County Cooperative Association at Cambridge, whose producer members deliver to the Buskirk plant, testified on cross examination by Hood's attorney that his association could not benefit from a new plant at Greenwich. He said theirs was a "particular New York setup"; that his association would not be able to maintain its revenue by delivering some milk to Greenwich and some to Buskirk; and that the present Buskirk arrangement benefited his association's producers because Buskirk is "geographically situated for trucking" (R. 63). Moreover, because of health regulations, a trucker could not carry Hood milk and Gold Medal Farms (Buskirk) milk on the same truck (R. 68). If a truckman loses part of his load he is likely to discontinue the route altogether because "it would not pay him to run it." New York City Health Department regulations do not permit milk inspected for other markets to be on the same truck with milk inspected for New York City consumption (R. 64).

¹⁵ Market Administrator's Listings of Handlers and Plants.

The manager of the Buskirk plant¹⁶ testified that its capacity was 3,000 cans per day. In the recent shortage he said the plant payroll had been maintained in anticipation of increased volume in the flush period, but if plant volume should be reduced its manufacturing operation would not pay (R. 64). Moreover, health department regulations have a distinctly local application and are issued for special purposes. For example, they may relate to the size of the farmer's milk house depending on the number of cows. While Boston permits premium payments for bacteria count regardless of fat content, New York does not. According to the witness, this would create "a demoralizing competitive situation in our area" (R. 65).

The items enumerated above and many other local situations contribute to the milk industry in New York factors calling for special methods of control.¹⁷ They are situations not licensed by federal order and which because of their number and diversity are beyond the effective reach of Congress. (*California v. Thompson*, 313 U. S. 109, 113, 115; *Parker v. Brown*, 317 U. S. 341, 362). The commissioner, however, heard about them on the administrative hearing and was cognizant of them when he made his order.

If milk is drawn from the New York order plants, and they in turn draw from plants supplying Troy, or Glens Falls, or Schenectady, the latter plants (the commissioner knows from experience) will retaliate. The whole market is then inflamed and interstate as well as local supply is

¹⁶ Buskirk is approved under the New York Federal Order (Market Administrator's Listings of Handlers and Plants). The commissioner's records show it is primarily a fluid milk and cream plant, varying according to seasonal demand.

¹⁷ "The fluid milk industry is affected by factors of instability peculiar to itself which call for special methods of control." (Pitcher Report, Legislative Document No. 114, p. 15).

endangered—Boston's as well as New York's since Hood would not be immune from retaliation either. Instead of jealously protecting local markets as petitioner contends, the commissioner's license control protects the interstate outlets. The particular area is a tight one. It is part of the interstate milk shed for which Governor Lehman back in 1934 sought federal cooperation to control. (*supra*, pp. 11-12).

Competing plants are but a few miles from each other (R. 56, 57, 67). Petitioner's brief points out at page 41 that the free flow of milk from one federally controlled market to another should not be interfered with. The commissioner's licensing power does not interfere. It stabilizes by control at the source and thus keeps open the flow of supply. Under special pricing of the State-Federal New York Marketing Order milk produced in New York State may be sold in fluid form in New England markets such as Springfield, Worcester, and Hartford, and in Boston.¹⁸ In other words, the commissioner's plant control pursuant to section 258-c is not an arbitrary and sectional power. It does not discriminate. Petitioner does not allege discrimination. Section 258-c operates with equality toward resident and non-resident plant operators alike.¹⁹ It protects the supply for New England and New Jersey as well as New York.

Petitioner's brief suggests that it is significant the secretary has refused to establish identity of prices under both orders (pp. 42-43). He has found, says the petitioner, "that precise alignment is not feasible, and that milk has

¹⁸ As Class 1-B in Boston and Class 1-C in markets not under federal order.

¹⁹ See *Dusinberfe v. Noyes*, 284 N. Y. 304; 31 N. E. 2d 34;

Dellwood Dairy Co. v. Noyes, 288 N. Y. 115; 43 N. E. 2d 95;

Application of Coday Farms v. Du Mond, 269 A. D. 888; 56 N. Y. S. 2d 243.

not been unduly attracted from one area to the other." Section 258-c and the commissioner's control under it are factors in maintaining "orderly marketing" to prevent undue attraction. The commissioner's representatives and the Market Administrator's men work together. (See Appendix, p. 35.) The commissioner as well as the secretary is acquainted with the interstate problem. Both work together and not at cross purposes.

For example, at page 22 of petitioner's brief there appears a table footnote showing the number of New York producers shipping to Boston. "Boston Milk Market Statistics" from which that table is taken shows that in April 1944 Hood's Norfolk, New York plant was taken over and New York milk from there entered the Boston pool, while in August 1946 Clinton County (N. Y.) Dairymen's Association commenced delivering New York milk to Hood at Plattsburg destined for Boston (pps. 38, 39). Therefore, the jump in the number of producers in 1947 includes both those increases and accounts for 466 of the 1090 producers shown in the table. The New York producers delivering to these two plants, together with milk included in the Boston pool in February and March 1947 from an Ogdensburg, New York, plant, supplied 49.4 million pounds of milk out of a total of 111.9 pounds of New York milk supplied to the Boston market, all of which went to Hood. (Petitioner's table 41 on same page). For an explanation of these figures see Appendix page 37.

There was absolutely no interference from the commissioner. These were established plants. When, however, a new plant is opened—one not heretofore a part of the market structure—the whole economy is upset and the repercussions which follow tend to disrupt and destroy orderly marketing. Each new milk plant increases produc-

tion costs. In times of scarcity dealers rush in to acquire new plants which in later years of surplus they quickly abandon throwing producers out of a market. The commissioner's control under section 258-c is an over-all, long range program calculated to prevent loss to the producer and thus to conserve a continuing supply necessary to the health and welfare of consumers in far away centers of population. While petitioner professes not to contend "that the Federal scheme leaves no room for any state regulation of milk dealers" (petitioner's Brief, p. 40), its attack is upon the heart of licensing control which if successful will destroy all state cooperation in its paramount agricultural industry.²⁰

Even though Congress has acted by federal price order, this alone will not nullify section 258-c if the federal action does not occupy the same field, "or is consistent with it". (*Hartford Indemnity Co. v. Illinois*, 298 U. S. 155, 158). When collaboration is found "the courts should not find conflict" (*Union Brokerage Co. v. Jensen*, 322 U. S. 202, 209). Repugnance or conflict should be direct and positive so that the two acts cannot be reconciled or consistently stand together. (*Bethlehem Steel Co. v. N. Y. State Labor Relations Board*, 330 U. S. 767, 780). Where the state regulation is such as to coincide with congressional policy, it is entitled to be sustained. (*Parker v. Brown*, 317 U. S. 341). "Congress may circumscribe its regulation and occupy a limited field." (*Townsend v. Yeomans*, 301 U. S. 441, 454). It seems clear that section 258-c was not aimed at interstate commerce and under the particular facts at bar its effect, if any, on petitioner's commerce is far less than instances which this court has held the states are

²⁰ Section 258, K, Agriculture & Markets Law.

legitimately entitled to pursue. (*So. Carolina Highway Dept. v. Barnwell Bros. Inc.*, 303 U. S. 177).

In evaluating petitioner's contention that the commissioner's order obstructs its commerce and conflicts with federal control, it becomes of some significance that rather than conflict we have cooperation and rather than complete invasion of the state function, the federal power extends to milk pricing while the supporting state power remains in the local licensing field. (*Interstate Gas Co. v. Federal Power Commission*, 331 U. S. 682, 692). The federal action occupied only that part of the field which this court in *Baldwin v. Seelig* had held New York could not reach. The weight of federal regulation reinforced the gap, but had no intention to cut down remaining state power. (*Panhandle Eastern Pipe Line Co. v. Public Service Commission*, 332 U. S. 507, 517, 519).

III

Petitioner is estopped from attacking the Commissioner's order.

Under its New York license petitioner is guarded by the same section 258-c it now seeks to destroy. It obtained a valuable property right which prevented unlicensed persons from competing with it in business. For years it availed itself of its license benefits and continues to enjoy its license and those benefits while at the same time, carrying on court proceedings in the hope of annulling such control as it considers annoying to it. *The order Hood attacks here is the same order which grants it a milk license* (R. 9). [*Booth Fisheries Co. v. Industrial Commission*, 271 U. S. 208.]

This is not a case where petitioner just stood by and made no protest. It has done more. It has availed itself of the license's benefits. (*St. Louis Malleable Casting Co. v. Prendergast Construction Co.*, 260 U. S. 469.) The decisive test in estoppel seems to be that the litigant seeks some advantage from the statute it attacks other than say a mere right to sue under it. (*Oklahoma v. Civil Service Commission*, 330 U. S. 127, 139-140).

Petitioner may argue that it had to submit to jurisdiction because of fear of losing the license it previously had enjoyed. (See *Great Falls Manufacturing Co. v. Garland*, 124 U. S. 581, 600). The answer is that the *Seelig* procedure would apply. Hood could have refused license when dissatisfied with the commissioner's order and upon threat of prosecution for trading without one, could then have sought to restrain the enforcement of the state law.²¹ The whole matter could have been gone into thoroughly and the facts we have attempted to demonstrate here would have become proof on the record. However, by coming in on an administrative license hearing without warning the commissioner's agents of the possibility of constitutional attack then, nor later by legal pleading, much essential evidence is lacking to respondent's prejudice.

²¹ *Baldwin v. Seelig*, 294 U. S. 511, 520.

Conclusion

The congressional regard for continued state power to license milk dealers in New York should be acknowledged. The state-federal cooperation through which licensing and pricing serve the public interest should not be ignored and stricken down. The order and judgment of the Albany County Supreme Court should be affirmed.

Respectfully submitted,

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DONALD L. BRUSH, Department Counsel,
*Attorneys for respondent Commissioner of
Agriculture and Markets of the State of New York.*

November, 1948.

APPENDIX

Agriculture and Markets Law

§ 258-k. *Declaration of policy.* It is hereby declared that the dairy industry is a paramount agricultural industry of this state and the normal processes of producing and marketing milk have become an enterprise of vast economic importance to the state and of vital interest to the consuming public which ought to be safeguarded and protected in the public interest; that it is the policy of this state to promote, foster and encourage the intelligent and orderly marketing of milk through producer owned and controlled cooperative associations; that unfair, unjust and destructive demoralizing trade practices have been and are likely to be carried on in the production, sale, processing and distribution of milk and that it is a matter of public interest and for the public welfare for the state to promote the orderly exchange of commodities and in cooperation with the federal government, in its regulation of interstate commerce, to take such steps as are necessary and advisable to protect the dairy industry and insure an adequate supply of milk for the inhabitants of this state; that for such purpose public interest requires, as necessity therefor has arisen or may arise, the fixing of prices of milk to be paid to producers and associations of producers where there has been or is a disruption of orderly marketing of milk in any marketing area by reason of surpluses or by reason of unfair, unjust or destructive trade practices so that the prices of milk to the producers are or may be below the reasonable costs of production and impair their purchasing power; that in order to make such price fixing effective, it is necessary that the benefits of the fluid market and the burden of, and the expense of, handling of surpluses, be shared equally by all producers of milk for the marketing area and to this end that dealers not handling their proportionate share of the surplus shall as part of the price of their milk make payments to a fund to equalize the prices of milk to producers and to share the cost of handling surplus so as to remove one of the principal causes of price demoralization.

§ 258-n. *Interstate and federal compacts.* The commissioner is hereby authorized to confer with legally constituted authorities of other states and of the United States

with respect to a uniform milk control with states and/or as between states, and with the federal government in its control of prices of milk handled in interstate commerce, and may exercise his powers hereunder to effect such uniform milk control. He may join with such other authorities federal and state in conducting joint investigations, holding joint hearings and issue joint or concurrent orders, or orders supplementary to those of the federal government, and shall have the power to employ or designate a joint agent or joint agencies to carry out and enforce such joint, concurrent or supplementary orders.

Agricultural Marketing Agreement Act of 1937 (c. 296, 50 Stat. 246), 7 U. S. C., sections 602 and 610 (i)

2. Declaration of policy; establishment of base periods for prices.

It is hereby declared to be the policy of Congress—

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period. The base period in the case of all agricultural commodities except tobacco and potatoes shall be the prewar period, August 1909-July 1914. In the case of tobacco and potatoes, the base period shall be the postwar period, August 1919-July 1929; and, in the case of all commodities for which the base period is the pre-war period, August 1909 to July 1914, will also reflect current interest payments per acre on farm indebtedness secured by real estate and tax payments per acre on farm real estate, as contrasted with such interest payments and tax payments during the base period.

(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current con-

sumptive demand in domestic and foreign markets, and (b) authorizing no action under this title which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

§ 10 (i) *Cooperation with State authorities; imparting information.*

The Secretary of Agriculture upon the request of the duly constituted authorities of any State is directed, in order to effectuate the declared policy of this chapter and in order to obtain uniformity in the formulation, administration, and enforcement of Federal and State programs relating to the regulation of the handling of agricultural commodities or products thereof, to confer with and hold joint hearings with the duly constituted authorities of any State, and is authorized to cooperate with such authorities; to accept and utilize, with the consent of the State, such State and local officers and employees as may be necessary; to avail himself of the records and facilities of such authorities; to issue orders (subject to the provisions of section 608c of this title) complementary to orders or other regulations issued by such authorities; and to make available to such State authorities the records and facilities of the Department of Agriculture: *Provided*, That information furnished to the Secretary of Agriculture pursuant to section 608d (1) of this title shall be made available only to the extent that such information is relevant to transactions within the regulatory jurisdiction of such authorities, and then only upon a written agreement by such authorities that the information so furnished shall be kept confidential by them in a manner similar to that required of Federal officers and employees under the provisions of section 608d (2) of this title.

STATE OF NEW YORK

DEPARTMENT OF AGRICULTURE AND MARKETS

MILK CONTROL BOARD

Hearing No. 18

A public hearing of the Milk Control Board was held in Chancellors Hall, State Education Building, Albany, N. Y., on Tuesday, January 9, 1934, at 1:00 P. M., for the purpose

of supplementing, altering, revising and/or amending any or all Official Orders heretofore promulgated by it.

Present:

Charles H. Baldwin, Commissioner of Agriculture and Markets, Presiding.

Dr. Thomas Parran, Jr., State Commissioner of Health.

Kenneth F. Fee, Director, Milk Control Board.

Henry S. Manley, Counsel, Department of Agriculture and Markets and Milk Control Board.

H. R. Waugh, Acting Secretary, Milk Control Board.

Also present were approximately 1200 dairy farmers and representatives of distributors, consumers and other interested parties. (Note.—The hearing, originally planned to be held on the first floor of the State Office Building at Albany, had to be changed to Chancellors Hall owing to the large number which attended.)

GOVERNOR LEHMAN:

Mr. Chairman and Friends:

I came over here today because I wanted to say something to you in connection with the milk problem, which I think is of great importance and which I think you all ought to know about, and on which, frankly, if I am to be helpful to you, I need your help.

I am going to speak very briefly, and I am going to ask to be excused immediately upon the completion of my remarks, because unfortunately I have an extremely busy schedule ahead of me at the Capitol and I therefore must return to my office immediately on the completion of my brief talk.

Last autumn various groups in this State and in the other states of the milk shed prepared a Milk Code for submission to Washington. The Code—in the formulation of which I had no part—was submitted to Washington two or three months ago, but no action has as yet been taken on it. Since then, efforts have been made by the Milk Control Boards of this State and of New Jersey to formulate a joint plan to stabilize the industry in the New York milk shed. The plan, according to the two Boards, is intended to serve temporarily the same purpose as the proposed

milk marketing agreement which has been pending for two or three months past in Washington, as I have previously described.

I know that one of the purposes of the hearing today is to discuss the question of the proposed milk marketing agreement. I am not here on behalf of any specific Code. That is a matter that goes beyond my authority. I am here, however, because I am deeply concerned with this situation and with the problems confronting the milk producers of this State.

The Milk Control Law has been effective in many ways. It has, for months, been very helpful to the producers. It has, on the whole, undoubtedly led to increased returns to the producers. I recommended last week to the Legislature, in my Annual Message, a continuation of the functions and the operations of the Milk Control Board, subject to such changes as may be found necessary in view of changed conditions and the prospective decision of the Supreme Court of the United States, which will be handed down very shortly.

It will be my desire as Governor, as well as that of the Milk Board, to help the producers of milk to the utmost of our powers, because we realize and appreciate the great difficulties and hardships with which the producer has been and is still confronted.

Of course in any program, the interests of the consumer should not be unjustly sacrificed. The problem of milk control within this State, however, goes far beyond the bounds of the State itself. We work, in the milk shed, in association with other states. The problems of production control, price control, distribution, etc. in this State are not only affected but, to a very great extent, are actually controlled by the attitude of other states.

The New York milk shed, comprising various states, imposes real interstate problems. I am convinced, from my observations, that the problem of milk control in this State cannot be adequately or in any way promptly and satisfactorily handled unless we have some form of constructive Federal cooperation, which will permit us to handle the problems of the New York milk shed as a whole in a comprehensive and coordinate way.

There's no use in fooling ourselves in these matters. We might just as well, my friends, face an unpleasant situation courageously and look the facts in the face. I feel it my duty to say to you gentlemen that I am deeply apprehensive with regard to the milk situation in this State, unless we can secure Federal cooperation in the working out of the administration of problems of the several states that go to make up the New York milk shed.

That cooperation must come either through the adoption and the enforcement of a Code, or through Federal approval of an interstate compact between the State of New York and the contiguous states of New Jersey and Pennsylvania. If we do not receive that cooperation, I see only increased competition between producers, price-cutting and an almost complete inability of any State in the milk shed to limit production of milk and milk products.

I have felt so deeply concerned about the situation that some time ago I asked Dr. C. E. Ladd, Dean of Cornell University, and Mr. C. R. White of Ionia, both members of the Governor's Agricultural Advisory Committee, to go to Washington and lay the situation before the Federal authorities. They are again in Washington today or tomorrow at my request, and I hope and expect that they will be able to confer with the responsible Federal officials, and I hope to be able to lay the matter even before the Chief Executive of the Nation, President Roosevelt. (Applause.)

I cannot, my friends, over-emphasize the importance to the milk producers of this State of securing Federal cooperation in the promulgation of a sound Milk Code which will embrace all the states of the milk shed. With such cooperation I believe that much can be accomplished, although obviously our problems will still be very great. Without such cooperation, I have no hesitation in saying that I am deeply concerned by the situation which will confront the milk producers and the milk industry generally in this State during the coming months.

I feel that every effort should be made by you gentlemen to strengthen the hands of your Governor and the hands of your Milk Control Board in the effort to secure Federal cooperation to stabilize, regulate and control the milk industry engaged in interstate commerce within the New York milk shed.

As Governor of the State, I pledge myself, with your help, to do everything possible to secure this Federal co-operation, which I consider indispensable for the permanent stabilization of the milk industry in this State.

I do not think I have made my remarks too strong; I do not think I have over-emphasized the situation. It is one that will bear your scrutiny and study, just as it bears the scrutiny and study of the Milk Control Board and the Governor and of anybody who is sincerely interested in the success and prosperity of this, one of our greatest industries of the State.

I want your help in trying to secure this Federal co-operation, and I am confidently counting on receiving it. I thank you.

(Continued applause.)

Memorandum of the Principles of Cooperation to be Observed in the Formulation and Administration of Complementary Orders for Milk for Marketing Areas Located Within the State of New York to be Issued Concurrently by the Secretary of Agriculture and the Commissioner of Agriculture and Markets.

In order that the policies of cooperation embodied in Section 10 (i) of Public Act. No. 10, 73d Congress, as amended and as reenacted by the Agricultural Marketing Agreement Act of 1937, and Section 258-n of Article 21 of the Agricultural and Markets Law, State of New York, may have their fullest possible effect in spirit and in practice, the following principles of procedure are hereby mutually approved as the basis of cooperation in marketing areas in the State of New York in which Federal and State complementary and concurrent orders, rules, or regulations may hereafter be issued.

JOINT PROCEDURE

It shall be the policy of the Secretary of Agriculture and the Commissioner to act jointly in the formulation and issuance of complementary and concurrent orders regulating the acquisition of milk by handlers and milk dealers

who market or in any manner participate in the acquisition, processing, or distribution of milk to be marketed in such marketing areas as may be defined in such complementary and concurrent Federal and State orders, and in pursuance thereof to jointly arrange for cooperation in the conduct of preliminary investigations, to hold joint or concurrent hearings, to jointly consider the facts contained in the record of such hearings, and to maintain a mutual exchange of views conducive to common agreement upon all essential provisions prior to the issuance of either order. The same policy of joint action shall be followed with respect to modifications of or amendments to such orders.

UNIFORM PROVISIONS

The Secretary of Agriculture and the Commissioner shall, in their respective complementary and concurrent orders for marketing areas within the State of New York, establish (a) identical classifications of milk to which comparable prices, inclusive of authorized assessments, fees, adjustments, or deductions, shall apply, and (b) identical differentials or other terms or conditions of purchase and acquisition and payment to the extent authorized by the respective Federal and State statutes. In the event any method of payment to producers or associations of producers is prescribed by both orders applicable to the same marketing area, provisions for such method shall be so drawn in the respective Federal and State complementary and concurrent orders that the plan of uniformity for all producers or associations of producers supplying the market will not be altered in any way by the fact that the acquisition of such milk or the payment therefor is deemed to be governed by either order. The contents of any such order issued by the Secretary of Agriculture or by the Commissioner shall be limited to terms, conditions, and prices relative to the acquisition of milk by handlers and milk dealers, and accounting and settlement therefor, and the administration thereof.

EXCHANGE OF INFORMATION

It shall be the policy of the Secretary of Agriculture and the Commissioner to exchange all information essential to the proper administration of their respective com-

plementary and concurrent orders and relative to transactions within the regulatory jurisdiction of such authorities. The confidential nature of information so exchanged shall be subject to the requirements of Section 10 (i) of Public No. 10, 73d Congress, as amended and reenacted by the Agricultural Marketing Agreement Act of 1937, and, on the part of the Secretary of Agriculture, to the provisions of the Agriculture and Markets Law, State of New York, and in either case subject to such rules and regulations as may be issued under the respective Federal and State statutes.

ADMINISTRATIVE AGENCY

The Secretary of Agriculture and the Commissioner shall utilize one and the same agency for the administration of each respective complementary and concurrent order, which shall be a market administrator who is approved and designated as such by both the Secretary of Agriculture and the Commissioner. The duties of the market administrator shall be confined to the administration of the orders pursuant to which he has been designated and, while serving in such capacity, the market administrator and such personnel as may be employed by him shall not be utilized by either the Secretary of Agriculture or the Commissioner, during the period of employment, in the administration of any other orders or of the terms or conditions in any other orders not common to both. All employees shall be under the exclusive direction of the market administrator and may be utilized to carry out any of his duties. Nothing herein shall be deemed to prevent the Secretary of Agriculture or the Commissioner from designating the same person as the market administrator of complementary and concurrent orders issued for each of two or more marketing areas within the State of New York.

FINANCES

Expenses incurred in the maintenance of the market administrator's office shall be paid by assessments or deductions made and collected for this purpose pursuant to the respective complementary and concurrent orders applicable to the same marketing area. Disbursements from the funds so collected shall be at the direction of the market

administrator, subject to the audit of both Federal and State authorities: Such assessments or deductions shall be identical in rate and shall be made in such a way that uniformity under the Federal and State orders in returns to producers and gross cost to handlers or milk dealers, inclusive of such assessments or deductions as the case may be, shall not be affected by the manner of making the assessment or deduction under the respective orders.

Administrative expenses shall constitute only those expenses incurred in the performance of the duties of the market administrator as set forth in the respective complementary and concurrent orders applicable to a given marketing area as distinguished from overhead incurred by the Federal or State governments in the administration, supervision, and enforcement of such orders.

ADMINISTRATION

The market administrator designated under complementary and concurrent orders shall use a uniform system in securing periodical reports from handlers and milk dealers, in auditing and verifying the same and in making any and all necessary corrections or adjustments. The general policy of cooperation shall be understood to extend to the interpretation or application of uniform or similar provisions. It is also understood that whatever periodical reports are required to be made by the market administrator to the respective central offices of the Federal and State governments, shall be uniform. Likewise the books, records, and accounts of the market administrator shall be open for inspection and audit to both the Secretary of Agriculture and the Commissioner.

ENFORCEMENT

The failure of any person to comply with any of the provisions of a complementary and concurrent order shall be regarded as of mutual concern, and the respective governmental authorities shall be kept fully advised in regard thereto so that a cooperative effort may be made to decide upon a proper course of action. In all matters affecting enforcement of their respective complementary and concurrent orders applicable to the same marketing area, the

Secretary of Agriculture and the Commissioner will undertake, both severally and jointly, to utilize all means at their disposal for the effective enforcement of such orders.

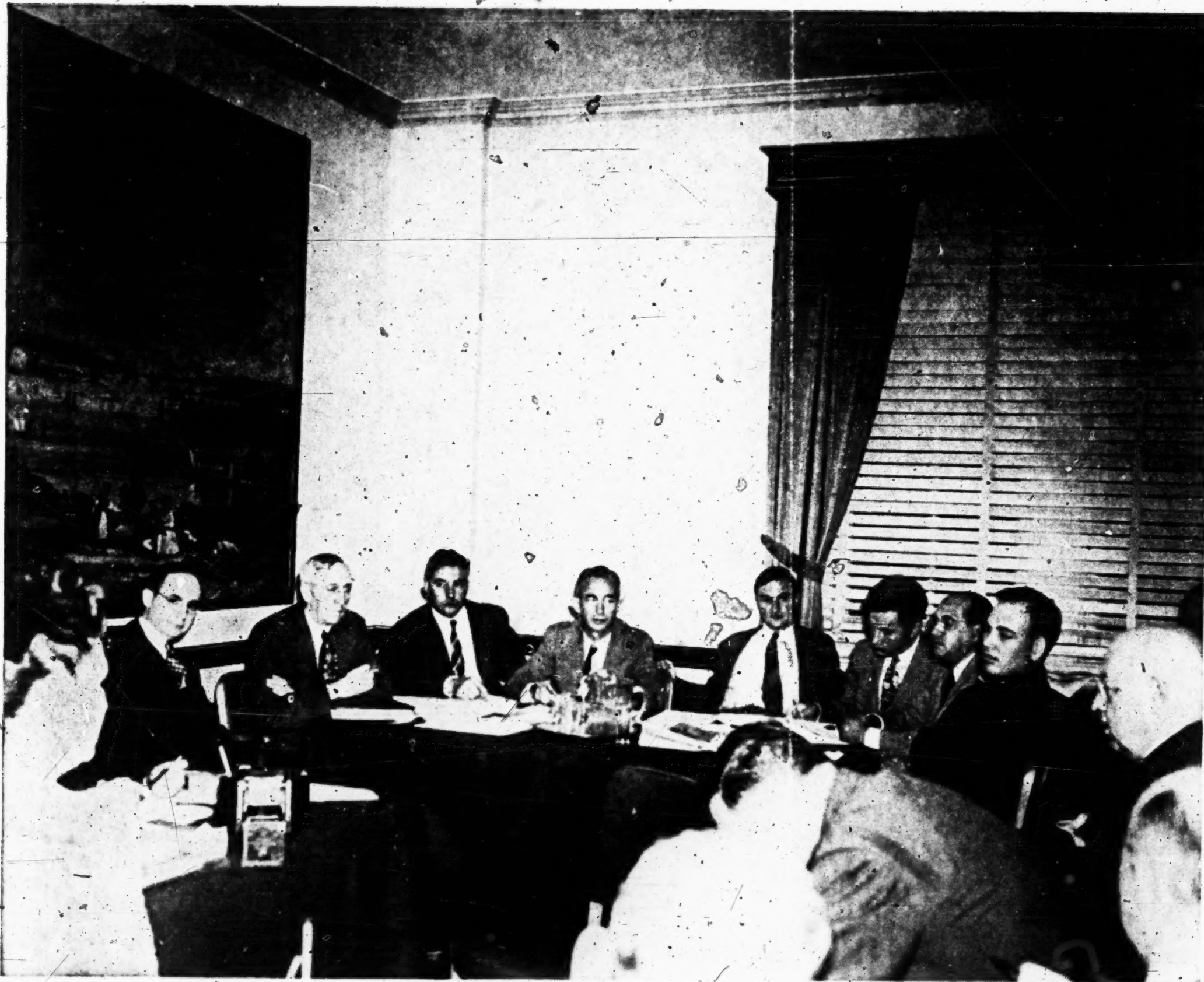
INTERSTATE COOPERATION

In recognition of a common interest in the regulation of marketing conditions on the part of duly constituted authorities of the State in which the marketing areas are located and those of the States from which substantial quantities of milk flow to such marketing areas, and with a view to encouraging coordination of effort in the regulation thereof, the Secretary of Agriculture and the Commissioner will follow the policy of inviting consultation with such authorities from time to time in matters of mutual interest arising in connection with the formulation, modification, or administration of complementary and concurrent orders applicable to marketing areas within the State of New York.

Signed this 26th day of August 1938.

HOLTON V. NOYES,
*Commissioner of Agriculture and Markets,
State of New York.*

/s/ H. A. WALLACE,
Secretary of Agriculture.



ABOVE—OFFICIALS AT THE HEARING LISTENING TO THE TESTIMONY OF HERBERT KLING ON PRICE OF MILK TO GO INTO CHEESE.

From left to right, Herbert Kling, witness for the Bargaining Agency; Kenneth Fee and L. L. Clough from the New York State Division of Milk Control; George Ware, Dairy Branch, U.S.D.A.; Anson Pollard, Assistant Market Administrator; Julius C. Krause, Attorney U.S.D.A.; Edward F. Nucle, Market Administrator's office; J. B. Rosenbury, Dairy Branch, U.S.D.A. and Frank B. Lent, Attorney representing the combined producer groups consisting of the Metropolitan Cooperative Milk Producers Bargaining Agency, Inc., including as one of its members the Dairymen's League Cooperative Association, Inc., District 50 United Mine Workers of America, Mutual Cooperative of Independent Producers, Inc., and Eastern Milk Producers Cooperative Association, Inc. (From "Metropolitan Milk Producers' News," October 1949)

MILK FROM PLANTS IN NEW YORK STATE INCLUDED IN BOSTON POOL IN 1947

<i>Plant</i>	<i>Number of Producers⁽¹⁾</i>	<i>Total Weight of Milk⁽²⁾</i>	<i>Percentage of Total</i>	<i>Period included in Boston Pool⁽³⁾</i>
Eagle Bridge	369	36,728,757	32.84	Aug. '37—Dec. '47
Salem	245	25,770,148	23.04	Aug. '37—Apr. '46 Aug. '46—Dec. '47
Norfolk	173	15,303,402	13.68	Apr. '44—Dec. '47
Plattsburg	293	31,443,035	28.11	Aug. '46—Dec. '47
Ogdensburg (*)	29	2,608,941	2.33*	
	1109	111,854,283	100.00	

⁽¹⁾ This is the average number of producers making *regular* deliveries monthly as shown by reports filed by dealers with the Commissioner of Agriculture and Markets.

⁽²⁾ From reports filed by dealers with Commissioner of Agriculture and Markets.

⁽³⁾ From—Boston Milk Market Statistics August 1937—December 1947—Page 34 referred to at Page 22 of petitioner's brief.

^(*) Milk received from 171 producers in February 1947 and 175 producers in March 1947 was included in the Boston pool and not so included for any other period. Number of producers delivering to this plant apparently omitted from Table 29 on page 22 of petitioner's brief although the volume of milk received from them appears to have been included in Table 41 on page 22 of petitioner's brief.